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June 18, 2021

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
Civil Docket No. 3:16-md-2738-FLW-LHG

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IN RE:

JOHNSON & JOHNSON TALCUM  
POWDER PRODUCTS MARKETING,  
SALES PRACTICES AND PRODUCTS  
LIABILITY LITIGATION

REDACTED TRANSCRIPT

STATUS CONFERENCE VIA  
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\* \* \* \*

FRIDAY, JUNE 18, 2021

\* \* \* \*

BEFORE: SPECIAL MASTER JOEL SCHNEIDER, USMJ, RETIRED  
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Transcript of proceedings in the

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above matter taken stenographically by

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Theresa Mastroianni Kugler, Certified Court Reporter,

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license number 30X100085700, Notary Public of the

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State of New Jersey and the Commonwealth of

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Pennsylvania, VIA ZOOM REMOTE VIDEOCONFERENCE,

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commencing at 10:10 AM.

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1 SPECIAL MASTER SCHNEIDER: We're on the  
2 record in the federal court multidistrict litigation  
3 for oral argument on the parties privilege dispute.

4 I think it's a good idea, for purposes  
5 of this argument, to get the appearances. And we'll  
6 start with plaintiff.

7 Who is appearing for the plaintiff?

8 MR. LAPINSKI: Your Honor, good  
9 morning. Daniel Lapinski from the Motley Rice law  
10 firm on behalf of plaintiffs.

11 SPECIAL MASTER SCHNEIDER: Plaintiffs'  
12 team, why don't we get everyone's name, and then  
13 we'll go to the defense.

14 MS. PARFITT: Good morning, Judge  
15 Schneider. Michelle Parfitt, Ashcraft & Gerel on  
16 behalf of the Plaintiffs Steering Committee for the  
17 MDL. And good morning.

18 MS. O'DELL: Good morning. Leigh  
19 O'Dell from Beasley Allen on behalf of the Plaintiffs  
20 Steering Committee.

21 MR. TISI: This is Chris Tisi from  
22 Levin, Papantonio, Rafferty on behalf of the  
23 Plaintiffs Steering Committee.

24 MR. PLACITELLA: Good morning. Chris  
25 Placitella from Cohen, Placitella & Roth for the

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1 plaintiffs.

2 MR. BERMAN: And you have Lawrence  
3 Berman on behalf of the Plaintiffs Steering Committee  
4 Levin, Sedran & Berman in Philadelphia.

5 SPECIAL MASTER SCHNEIDER: Let's now  
6 turn to the defendants.

7 MS. MILLER: Good morning, your Honor.  
8 Jessica Miller on behalf of the J&J defendants from  
9 Skadden Arps.

10 MR. BERNARDO: Good morning, your  
11 Honor. Richard Bernardo also for the J&J defendants,  
12 also from Skadden Arps.

13 MR. BEISNER: Good morning, your Honor.  
14 John Beisner also from Skadden on behalf of the J&J  
15 defendants.

16 MS. SHARKO: Good morning. Susan  
17 Sharko from Faegre, Drinker, Biddle & Reath. Also  
18 for the J&J defendants.

19 SPECIAL MASTER SCHNEIDER: First, thing  
20 I want to do is just thank everyone for the extra  
21 special efforts they made to help myself get ready  
22 for this oral argument.

23 It's obvious a tremendous amount of  
24 work went into identifying the documents, putting the  
25 binders together, et cetera. And I think it was

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1 immensely helpful to me and I just want to say that I  
2 appreciate everyone's efforts who put us in this  
3 position.

4 I've studied the documents, I've  
5 studied the briefs. I have some general questions  
6 which I'd like to address and then after we get  
7 through those, you know, if anyone wants to say  
8 anything, of course.

9 Then I have some questions regarding  
10 some individual documents. I sent that email out  
11 yesterday, I thought it would help move things along  
12 more efficiently today. Some of those questions have  
13 been answered.

14 Ms. Miller and I communicated and we  
15 straightened out some supplements to the binders,  
16 which was extremely helpful. I've received all of  
17 that. I'm comfortable I know the record.

18 To be perfectly candid, I don't think  
19 there is a tremendous dispute amongst the parties  
20 about the applicable law. It's been set forth in  
21 many, many cases, including cases I authored when I  
22 was on the bench, but obviously the dispute is how  
23 you pigeonhole some of these documents.

24 I understand the difficulties the  
25 plaintiffs had responding to the defendant's brief

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1 because they don't have the benefit of seeing the  
2 documents, but I understand their arguments and the  
3 positions they take.

4 I welcome Mr. Block who is on the phone  
5 as a listener.

6 You know my feeling. I think it makes  
7 tremendous sense when the issues between the two  
8 litigations are so related that everyone should be  
9 updated on what's going on and I'm glad to see  
10 Mr. Block is a participant, just as a listener, not  
11 as a participant.

12 I thought a good place to start is to  
13 understand the history of how we got to where we are  
14 right now with the 156 documents and whether the  
15 issues that I'm going to deal with and decide have  
16 ever been dealt with before and whether the documents  
17 at issue have ever been the subject of prior  
18 decisions. And I'll mention in a moment whether  
19 similar-type documents have been produced in other  
20 litigations and how we deal with the situation if  
21 some of the document types that the J&J defendants  
22 are claiming in this case are privileged,  
23 similar-type documents were produced in other cases  
24 and how we deal with that.

25 So starting from the beginning, maybe

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1 start with the plaintiffs because they're challenging  
2 the documents.

3 How did we get to this 156?

4 MR. LAPINSKI: Good morning, your  
5 Honor. This is Dan Lapinski on behalf of the  
6 Plaintiffs Steering Committee.

7 Your Honor, we got to the documents  
8 that are in front of you, and I will, as necessary,  
9 ask that the other members of the Plaintiffs Steering  
10 Committee that are on the call that have more  
11 historical background in various state court  
12 litigations that have gone on, they can chime in.

13 But from a broader perspective, in  
14 April we were provided with a privilege log and on  
15 that privilege log initially I think there were about  
16 12 thousand documents that were on the privilege log.  
17 We were able to narrow that privilege log down so  
18 that we were only dealing with about, and I'm using  
19 rough numbers, about six thousand documents we were  
20 dealing with after that. That number got narrowed  
21 down further. We have a collection of documents that  
22 are in dispute amongst the parties.

23 We met and conferred and decided that  
24 the best thing to do in order to try and move this  
25 process along would be for us to identify categories

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1 of documents that we felt the disputed documents fell  
2 into. And then within those categories of documents  
3 provide exemplars of documents that came from those  
4 particular categories.

5 I think initially the discussions were  
6 that we were going to provide 50 documents from each  
7 category. And plaintiffs initially did that. Then  
8 we had some further meet and confers with defendants.  
9 Defendants downgraded some of the documents, we  
10 discussed the fact that some of the other documents  
11 were duplicative. And we ultimately ended up not  
12 locking ourselves into 50 documents from each  
13 category, but just by a random sampling. And that's  
14 why the five categories of documents that are in  
15 front of you, there are different numbers of  
16 documents that have been presented in each category.

17 So this process has been one where we  
18 have met and conferred and worked collaboratively  
19 with opposing counsel in order to be able to put  
20 representative documents in front of you. And the  
21 hope is that your rulings on these representative  
22 documents will give us guideposts that will enable us  
23 to continue to meet and confer and either have  
24 decisions made where plaintiffs aren't going to  
25 challenge other documents or where defendants are



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1 going to agree to produce additional documents so we  
2 have everything we have to work with.

3 SPECIAL MASTER SCHNEIDER: So the 156  
4 is a subset of how many remaining documents at issue?

5 MR. LAPINSKI: I think it's -- I'm  
6 looking right now. Hang on one second, your Honor.  
7 And Mr. Bernardo might be in a better position to  
8 more readily state that. I want to say that it was  
9 just over three thousand documents total that are  
10 still at issue.

11 SPECIAL MASTER SCHNEIDER: I don't need  
12 an exact number.

13 Is that about right, J&J?

14 MR. BERNARDO: Yeah, that's about  
15 right, your Honor.

16 SPECIAL MASTER SCHNEIDER: So there is  
17 plus or minus three thousand still at issue and this  
18 group of 156 is representative of that collection of  
19 three thousand documents, is that right?

20 MR. LAPINSKI: And actually, your  
21 Honor, if I can, I'm looking at page one of the  
22 briefing that we submitted in order to be able to  
23 pull more accurate numbers. And to go back and  
24 address your question from the start, on April 6th  
25 defendants had designated 6,886 documents as



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1 privileged. We did not challenge in excess of four  
2 thousand of those documents. So that would have left  
3 us with roughly 2,800 documents that would have been  
4 the subject of challenge. But since that time, the  
5 defendants have agreed to downgrade and produce  
6 either in full or with redactions 1,300. So we're  
7 probably looking at about a family of over 1,300  
8 documents in total that are still subject to  
9 challenge.

10 SPECIAL MASTER SCHNEIDER:

11 Mr. Bernardo, is that about right? We don't need an  
12 exact number.

13 MR. BERNARDO: We don't. But I just  
14 want to state, and that's for the very reason you  
15 say, your Honor, we've been spending considerable  
16 time working with Mr. Lapinski and obviously there is  
17 all sorts of nuances. I'll just say yes, that's  
18 about right, but I just want to make it clear that,  
19 you know, the number fluctuates depending upon what  
20 we're really talking about.

21 I also want to make clear and I think  
22 that Ms. Miller will also want to make that clear,  
23 that the defendants don't agree that the documents  
24 that plaintiffs have chosen are what I would say  
25 representative. You know, these -- Jessica's

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1 nodding, so I'm going to let her make that point.

2 MS. MILLER: I was waiting for our  
3 turn, Rich. I was following the rules.

4 MR. LAPINSKI: By Rich saying that I  
5 was right, I thought we started off well.

6 MR. BERNARDO: I did. And that's why  
7 I'm turning it over to Jessica, so I don't have to  
8 disagree with you, Dan.

9 SPECIAL MASTER SCHNEIDER: Do you know  
10 whether any of these 156 documents have been produced  
11 in any other litigation?

12 MR. BERNARDO: Your Honor, I can answer  
13 that with as much certainty as you can have when  
14 you're dealing with millions of pages of documents,  
15 but I'm fairly certain that the answer is no.

16 To answer a question you raised before  
17 and help perhaps your Honor to understand, I had  
18 responsibility for overseeing discovery on a national  
19 basis since probably mid 2017, and since that time  
20 one of the things that was asked of me was to make  
21 sure that across the country in all of the cases,  
22 whether they're mesothelioma, whether they're ovarian  
23 cancer, there is a coordination of the document  
24 production. So that if somebody in this case has  
25 something, we make sure somebody in the other case

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1 has that. And we do our best. I may not be perfect,  
2 but I think it's pretty good, to make sure that that  
3 happens, and that includes privilege.

4 We recognize that if we're going to  
5 downgrade something, for example, in Mr. Block's case  
6 in New Jersey that I'm going to provide that to the  
7 folks in the MDL and folks in other cases. And, in  
8 fact, we just did that, we just did a production  
9 bringing everybody up to speed.

10 To more directly answer your other  
11 question, your Honor, I can't really speak to the  
12 period prior to '17 with as much certainty, but I can  
13 also say that we/I have made efforts to ensure if  
14 there were rulings on other documents -- and as far  
15 as I'm aware, there has been no large-scale like this  
16 challenges, but if there have been rulings, if we  
17 haven't appealed them, then we've included the  
18 documents within the production.

19 I am only recalling, and Ms. Miller can  
20 help my memory here if I'm misremembering, that there  
21 has been a document that has had a court ruling in  
22 the last several years, and actually -- and that's  
23 one of the reasons we sought this kind of  
24 coordination because it's had several court rulings,  
25 including from Judge Wolfson, dealing with a

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1 particular topic and it keeps getting litigated over  
2 and over again. And in each instance the court has  
3 upheld our assertion of work product.

4 I note that that particular document is  
5 among the ones that was put before your Honor and I  
6 know that we made the point in our brief and in our  
7 accompanying charts of that history with that  
8 document. But other than that, we've had a number of  
9 what I would call fits and starts of challenges like  
10 this. And what I tried to do is to work with folks,  
11 whether it's to follow up or others to try and  
12 coordinate so we could make sure that we're not  
13 hitting a scenario that your Honor is describing  
14 where, you know, one court rules on this and then  
15 it's still being challenged.

16 I hope that answers your question.

17 SPECIAL MASTER SCHNEIDER: Well, it  
18 sounds like you came on board, which is a good thing,  
19 in 2017 and can make representations that after that  
20 date there has been a consistency in the productions.  
21 But are you confident, as to these 156, are you  
22 confident in representing that they haven't been  
23 produced at any time in the past in any of the other  
24 litigations?

25 MR. BERNARDO: Yes, your Honor, I am.

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1 And the reason for that is that the privilege log in  
2 this case was built from the prior privilege logs as  
3 a starting point. And we've made considerable  
4 efforts to work with various firms that have dealt  
5 with the document productions to ensure that what  
6 your Honor is describing is the case.

7 The reason I put that delineation, your  
8 Honor, is I just want to be careful and make it clear  
9 to the court where I come in, but as I stand/sit, I  
10 guess, I'm very comfortable that these documents that  
11 are on this log and at issue here have not been.

12 Because that's one of the very things  
13 we tried to do, your Honor, and that's one of the  
14 things that we worked on in dealing with this and  
15 narrowing it, is just to really take a very hard look  
16 to make sure that something that's continuing to be  
17 challenged didn't inadvertently get produced before.  
18 So I'm comfortable. I just put that delineation for  
19 transparency as to when I got involved.

20 MR. LAPINSKI: Your Honor --

21 SPECIAL MASTER SCHNEIDER: One second,  
22 I'll get right to you, Mr. Lapinski.

23 Just a follow-up question.

24 Can the same representation be made as  
25 to the 1300 documents that you're making as to the

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1 156? The 1300 documents on the privilege log.

2 MR. BERNARDO: Oh. Oh. I'm sorry,  
3 your Honor, I was pausing to write this.

4 Yes, I'm also comfortable with that  
5 within, you know, reasonableness of making -- I'll  
6 say better than best efforts to ensure that that is  
7 the case.

8 SPECIAL MASTER SCHNEIDER: Mr.  
9 Lapinski, you wanted to say something?

10 MR. LAPINSKI: Your Honor, I just  
11 wanted to make the note that in addition to the 13 or  
12 1400 documents that we're talking about on the  
13 privilege log, there are also a large number of  
14 documents that were produced with redactions. And  
15 we've noted that. We noted that in our briefing,  
16 that they're still the subject of meet and confers,  
17 but as compared to being able to make general  
18 objections in the context of the redactions, that's  
19 something that has to be looked at on a  
20 document-by-document basis in order to see where the  
21 redaction falls in and put it in the context as to  
22 whether or not it's going to be challenged.

23 SPECIAL MASTER SCHNEIDER: Those of you  
24 who have worked together with myself in the past, and  
25 Ms. Sharko knows this very well, I've said it a

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1 million times, I'm just not a very good poker player  
2 and I just put it all on the table. And I'm really  
3 perplexed about something, and let me just explain  
4 it.

5                   You know that in connection with the  
6 state asbestos cases, Mr. O'Shaughnessy's being  
7 deposed next week. Some of you participated in that  
8 phone call, phone calls that we had regarding the  
9 logistics of that deposition. One of the things that  
10 we did and agreed to was that each side was going to  
11 send a set of binders to myself of potential exhibits  
12 they're going to use at O'Shaughnessy's deposition.  
13 And I agreed to prepare for the deposition to look at  
14 those to be prepared for any objections that have to  
15 be addressed.

16                   Late last night when I got back to  
17 Ventnor, I opened an email that Mr. Block had sent me  
18 with the documents that he may use at the deposition  
19 of Mr. O'Shaughnessy next week. I can't identify any  
20 of those documents in particular, but I can say  
21 without hesitation that what perplexed me about those  
22 documents is, although they weren't identical to some  
23 of the documents at issue in this case, they were of  
24 the same type. And there were J&J Bates numbers on  
25 some of those documents, which apparently indicates



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1 that they had been produced by J&J at sometime in the  
2 past in some litigation.

3 And I guess the question I have is,  
4 you'll see this at O'Shaughnessy's deposition when  
5 the documents that Mr. Block is going to use, they're  
6 so similar to some of the documents at issue in this  
7 case, how do I deal with the situation where J&J is  
8 contending in this case that documents of this type  
9 are privileged, but they produce documents of the  
10 same type in other litigations? And am I permitted  
11 to, it's not part of the record in this case  
12 obviously, am I permitted to rely on what I learned  
13 from those documents that I reviewed that have  
14 admittedly been produced by J&J in making a decision  
15 as to the privilege issue in this case?

16 I mean one document, the first line of  
17 the document says something like "here are my  
18 impressions," and this was authored by Mr.  
19 O'Shaughnessy. Unless I'm missing something, it's  
20 clearly unequivocally work product, but yet it was  
21 produced. So how do I deal with that?

22 Ms. Miller, you're shaking your head,  
23 so let me start with you.

24 MS. MILLER: I'd like to punt to Rich,  
25 and I'll tell you why I'd like to punt to Rich and



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1 I'm going to be -- I am not a poker player either, as  
2 everybody on this call knows. I am known for my  
3 bluntness.

4 Rich told you we were involved, became  
5 involved in 2017 and when we became involved, we  
6 discovered that there had been inadvertently produced  
7 documents that were privileged. And that was,  
8 frankly, one of the reasons Rich became involved.

9 And so there is a problem that we have  
10 here that some privileged documents, and you're  
11 exactly right, they were privileged, they were work  
12 product, they unquestionably should not have been  
13 produced, have been produced. And I think Rich can  
14 talk about what efforts were made and what we've done  
15 about that. And that is a problem that we have to  
16 deal with.

17 MR. BERNARDO: And, your Honor, as Ms.  
18 Miller explained, my first day on this case was to  
19 address a memo that parties were fighting over that  
20 was so obviously privileged and work product that  
21 reflected communications and mental impressions about  
22 witnesses, and this was the subject of discussion  
23 with Judge Wolfson. This was the discussion of  
24 much -- I forget whether it was briefing or  
25 significant letter briefs, but in any event, much

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1 back and forth. And it was during that that I tried  
2 to go back in time and figure out exactly  
3 historically what had happened. And, you know, as  
4 best we can tell, there was human error back, you  
5 know, years ago in producing things. It wasn't a  
6 matter of what was or wasn't privileged. And what we  
7 were, you know, trying to focus on was this  
8 particular document and we dealt with that with Judge  
9 Wolfson and she allowed us to claw it back.

10 Having said that, and it is no longer  
11 in play. Having said that --

12 SPECIAL MASTER SCHNEIDER: Mr.  
13 Bernardo, the clawback document, was it a document  
14 produced in this litigation or other litigations? In  
15 this MDL or other litigations?

16 MR. BERNARDO: Both. It was something  
17 that in -- again, what I'm trying to avoid, your  
18 Honor, is taking you down into the roots too far and  
19 trying to simply answer your question. But if you  
20 need more detail, let me know, I can get it. It was  
21 just the result of the fact that historically similar  
22 efforts had been made to provide, you know, the same  
23 materials, but it was just a little bit different in  
24 terms of how the various cases were proceeding. I'll  
25 just leave it at that. Again, I can get into more

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1 detail, but I don't think it's necessary.

2 SPECIAL MASTER SCHNEIDER: Well, help  
3 me a little bit.

4 MR. BERNARDO: Sure.

5 SPECIAL MASTER SCHNEIDER: Because the  
6 issue that Judge Wolfson dealt with, I understand  
7 that she did make a ruling to clawback a document in  
8 this MDL, but as to the particular document you're  
9 talking about, if that was produced in some state  
10 litigation somewhere around the country, were there  
11 separate efforts in those cases to clawback the  
12 document?

13 MR. BERNARDO: Yes, your Honor, there  
14 were. And as far as we're aware, it was successfully  
15 clawed back.

16 The issue that Ms. Miller is alluding  
17 to and we've grappled with since that time, is 2017  
18 was a period of time when discovery in this  
19 litigation, both in the mesothelioma cases and the  
20 MDL, was, I'll say, blowing up and the idea of  
21 clawing back, as you can imagine, was almost an  
22 impossibility.

23 And we also tried to look at materials,  
24 and your Honor may see some of them, with an eye  
25 toward -- it's been in production for all of these

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1 years, can we even reasonably at this point in time  
2 claw it back? And in most instances, the material  
3 that you're seeing, which we've identified over time,  
4 the answer was no. That's why they're still in the  
5 production.

6 SPECIAL MASTER SCHNEIDER: Query.  
7 Again, we're not talking about the same exact  
8 document.

9 After we hear from you, I want to hear  
10 from the plaintiffs.

11 What do we do about the situation  
12 which, in my view plainly exists, where documents of  
13 the type that J&J is arguing should be privileged in  
14 this case, documents of that type have already been  
15 produced in the state litigation and there was no  
16 effort to claw them back? Is that somehow a waiver  
17 of the privilege in this case?

18 What's J&J's position?

19 MR. BERNARDO: So since Ms. Miller  
20 punted over to me, I'm going to punt it back to her.

21 (Laughter)

22 But let me just say at a very high  
23 level I want to make sure that we're being clear, and  
24 Ms. Miller will explain the argument on this.

25 We addressed the very issue with Judge

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1 Wolfson because there was a document that had been  
2 produced. And there was a related document, in fact  
3 an attachment to this inadvertently produced  
4 document, and she agreed that the inadvertent  
5 production of, you know, a document did not waive the  
6 privilege given the circumstances with respect to  
7 this other attachment.

8 But I just -- I'm going to turn it over  
9 to Ms. Miller to explain that in more detail, but I  
10 just want to point out that we have addressed this  
11 issue with Judge Wolfson previously, and I'll just  
12 turn it over to Jessica.

13 SPECIAL MASTER SCHNEIDER: Before we go  
14 to Ms. Miller, are we talking about inadvertently  
15 produced documents?

16 When I think of an inadvertent  
17 production, that's a mistake. Okay? They were  
18 produced in some litigation in the past. It doesn't  
19 appear to be a mistake. They might have -- how do we  
20 know it was a mistake? It might have been --

21 MR. BERNARDO: Your Honor, can I --

22 SPECIAL MASTER SCHNEIDER: -- someone  
23 may have determined that it wasn't a privilege.

24 You used the term inadvertent, I don't  
25 know if plaintiffs are going to concede that point.

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1 MR. BERNARDO: Your Honor, I think  
2 that's fair that they might not concede that point.  
3 And I'm now, I'll say, at the edge of what I feel  
4 comfortable communicating on record in open court  
5 with the plaintiffs. Having said that, I would be  
6 happy to provide additional information to explain to  
7 you how I am as close to one hundred percent certain  
8 that the inclusion of the documents that you see in  
9 the production was human error, inadvertence.

10 I spent more time of my life than I'd  
11 like to admit trying to understand that so that I  
12 could make sure I was comfortable making the kinds of  
13 representations that I just made, including like  
14 literally trying to go back and retrace them. So I'm  
15 happy to provide additional information. I feel  
16 uncomfortable doing that in open court because I  
17 think it would start to reveal what I would consider  
18 to be work product, but I can tell you with certainty  
19 that the inclusion of those things was inadvertent.

20 SPECIAL MASTER SCHNEIDER: Ms. Miller,  
21 before we get to -- we're going to get to you, Mr.  
22 Lapinski, but I want to hear from Ms. Miller first.

23 Anything to add?

24 MS. MILLER: Yes, your Honor.

25 We're sort of previewing a conversation

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1 we were expecting to have with you next week.

2 Under New Jersey law, when you have  
3 inadvertent disclosure, the waiver is not a subject  
4 matter waiver, it is limited to the four corners of  
5 the document. So we do not believe that the fact  
6 that this unfortunate inadvertent production occurred  
7 several years ago should in any way affect what  
8 gets -- what your rulings are with respect to these  
9 documents. And I can give you the case cites, if  
10 that's --

11 SPECIAL MASTER SCHNEIDER: You might as  
12 well get them now, yeah.

13 MS. MILLER: Okay. We were going to  
14 give them to you next week.

15 One case is D'Onofrio versus Borough of  
16 Seaside Park, 2012 Westlaw, 1949854, District New  
17 Jersey (2012).

18 And another case cite is Mason versus  
19 City of Atlantic, 2020 Westlaw 4355396, New Jersey  
20 Superior Court, Appellate Decision July 30th, 2020.

21 MR. LAPINSKI: Can you read the numbers  
22 in the cite again? 435 --

23 MS. MILLER: Yes. 4355396.

24 I actually wanted to ask your Honor if  
25 it would be okay if we could just submit, because



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1 there was no reply briefing, we had a list of cases  
2 that we researched yesterday in response to the  
3 opposition, I was wondering if we could just submit  
4 that list of cases to you at the end of the day  
5 today?

6 SPECIAL MASTER SCHNEIDER: Can we save  
7 that issue for the end of today's session, whether  
8 we're going to close the record or supplement the  
9 record, because there may be other issues that come  
10 up?

11 MS. MILLER: Sure. Okay.

12 SPECIAL MASTER SCHNEIDER: Mr.  
13 Lapinski.

14 MR. LAPINSKI: Yes, your Honor. Thank  
15 you.

16 My initial response is Mr. Bernardo and  
17 I agree on a second thing for today, and that is  
18 plaintiffs aren't going to concede that the documents  
19 that have been produced in other state courts, that  
20 they should not be made available to us.

21 SPECIAL MASTER SCHNEIDER: I'm sorry.  
22 Can you say that again? I'm sorry.

23 MR. LAPINSKI: Yes.

24 It's our position, we do not believe  
25 that if a document has been previously produced in



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1 state court and has not been clawed back, it is still  
2 available at a particular state court litigation, our  
3 position is that document is no longer a privileged  
4 document and we have a right to that document here in  
5 the MDL.

6 MR. BERNARDO: I'm sorry to interrupt,  
7 but I think there has been a misinterpretation of  
8 what I said, or I misspoke.

9 You do have that and we agree with  
10 that.

11 MR. LAPINSKI: Okay.

12 And so further to my point on that, one  
13 of the reasons that we're here in front of your Honor  
14 is because in the MDL, the defendants were pushing  
15 for coordination of the privilege process going on  
16 amongst the various state courts and the federal  
17 court, and they were doing so that there was  
18 consistency, and we kind of got fast tracked on it in  
19 order to start catching up with the state courts.

20 One of the reasons for looking for that  
21 consistency is, from our position, what comes along  
22 with that consistency is our right to be able to have  
23 access to all state court documents where a  
24 determination has been made that they're not  
25 privileged or the documents have been produced in the

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1 state court. And I think that that is the response  
2 to your inquiry, your Honor.

3 SPECIAL MASTER SCHNEIDER: Mr.

4 Bernardo, I understood you to say that you're on the  
5 same page with that. So that's how I understood what  
6 you're saying.

7 So my take-away from this discussion,  
8 the issue is if J&J produced a document of the type  
9 in state litigation that they're now claiming is  
10 privileged in this litigation, not the same exact  
11 document but it's a document of the same type, J&J's  
12 position is that, one, the state documents were  
13 inadvertently produced and that does not result in a  
14 waiver of their right to object in this MDL.

15 Did I correctly summarize, Mr.  
16 Bernardo, J&J's position?

17 MR. BERNARDO: That is correct, your  
18 Honor. The only distinction is, and again, the point  
19 of our legal position is correct, but I just want to  
20 again clarify, I think there are distinctions being  
21 made between state and MDL that are really no longer  
22 and haven't been for years valid because it's all the  
23 same document in question, at least for the last five  
24 years.

25 SPECIAL MASTER SCHNEIDER: Okay. One

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1 other issue that perplexed me on this front is you  
2 know I'm relatively new to this subject matter of  
3 litigation, but at least it's my impression that this  
4 litigation has been going on for years, from the  
5 documents that I've reviewed it's apparent that this  
6 has been a concern for a number of years, and I'm  
7 just perplexed about why we're in June 2021 and we're  
8 still dealing with a set of documents and whether or  
9 not they're privileged or not. And I don't  
10 understand why the issue is just coming to the  
11 forefront now when there is such a long history of  
12 this litigation. Why wasn't it previously raised and  
13 decided?

14 MR. LAPINSKI: Well, your Honor, from  
15 our perspective, the biggest reason is probably that  
16 from the outset of the litigation, the litigation was  
17 bifurcated and --

18 SPECIAL MASTER SCHNEIDER: So not  
19 necessarily -- I'm sorry, not necessarily in this  
20 litigation, Mr. Lapinski, but there has been state  
21 litigation for umpteen years and Mr. Bernardo and Ms.  
22 Miller represent that these particular documents have  
23 never been produced before. Why weren't these  
24 privilege issues addressed five, 10, 15, 20 years  
25 ago?

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1 Is there an answer to that question or  
2 we'll just move on?

3 Chris?

4 MR. PLACITELLA: Well, your Honor, one  
5 issue is, and maybe we can pin the date down, but  
6 many of these documents were not produced at all  
7 until 2016 or 2017, so...

8 SPECIAL MASTER SCHNEIDER: In which  
9 litigation?

10 State or federal?

11 MR. PLACITELLA: I believe it was in a  
12 state case that Mr. Block's office handled in New  
13 Jersey, but I'm not sure. So there is a whole  
14 battery of documents that no one saw, probably, you  
15 know, more than five years ago.

16 MS. O'DELL: Your Honor, if I could add  
17 some color to that.

18 When the MDL started, I'd have to go  
19 back and get precise numbers, but, you know, the  
20 total number of documents that have been produced was  
21 less than a hundred thousand is my memory. And, in  
22 fact, I think it was like 80 thousand. And since  
23 then, the volume of the production has grown  
24 exponentially.

25 So to support what Chris is saying, not

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1 only was that true with some of the mesothelioma  
2 state court cases, it certainly was true in the MDL.  
3 And as Dan mentioned, the beginning of the case was  
4 focused on science only. You know, we were targeted  
5 on general causation, we were very limited in the  
6 discover we could do, and it really is only at this  
7 juncture that we've had the opportunity to delve into  
8 the privilege log.

9 MR. BERNARDO: Your Honor, if I could  
10 just add a little bit of color and context, which I  
11 think is addressing your question.

12 And Mr. Placitella and I don't  
13 necessarily see eye to eye on the issue of when  
14 things were produced, but I don't think that's worth  
15 getting into here.

16 I think it's fair to say that until  
17 about 2016, 2017, the litigation was of a very  
18 different nature. There were more sort of one-off  
19 cases. They may or may not have been litigated as  
20 much. So that kind of addresses it up to 2016 and  
21 '17. And while I may not agree with plaintiffs'  
22 characterization of the volume of documents produced,  
23 I think your Honor raises an interesting question.  
24 So, okay, let's take it at least to 2017.

25 The documents that we're talking about

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1 here have been on logs and in plaintiffs', both in  
2 the MDL and in state cases, hands for, you know, the  
3 logs themselves for five years. And we have the same  
4 sort of question.

5 I just wanted to give you a little bit  
6 of that context. I can't answer why they haven't  
7 been pursued when the litigation has been as active  
8 as it has for the last four or five years, but I  
9 think that context explains a little bit why the  
10 difference between pre 2016-'17, where we talked  
11 about.

12 SPECIAL MASTER SCHNEIDER: Okay. Let's  
13 move on to a different subject on a general matter  
14 and another area that I think would be helpful to me  
15 in addressing these issues is to get a little bit of  
16 a flavor of the organization of J&J. I really didn't  
17 see that anywhere.

18 I see tons of emails with different  
19 departments and different sections. I don't know if  
20 the legal department is -- is there one general legal  
21 department for all the divisions, subsidiaries, et  
22 cetera, or does each sub have its own legal  
23 department? And I see there is a lot of people with  
24 the title of Assistant General Counsel. To me, that  
25 sounds like a pretty important position, but there is

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1 so many of them, I don't know how they relate.

2 So is it possible, Ms. Miller or Mr.  
3 Bernardo, you can give me a little tutorial on the  
4 organization of J&J and how the legal department fits  
5 into it? Because I've seen so many, so many  
6 different departments and sections, I'm trying to put  
7 all those pieces together.

8 MR. BERNARDO: I'm happy to see if I  
9 can give you a very broad overview, your Honor.

10 Recognizing that, as you can imagine,  
11 the corporate structure changes over the years, you  
12 know, there have been some nuances and changes. But  
13 at a very, very high level, your Honor is correct,  
14 there is a sort of shared-services organization in  
15 which the legal department sits. And there are  
16 individuals like Mr. O'Shaughnessy and like Mr. Kim  
17 and like Ms. Houghton and Mr. White, and I'm sure  
18 there are others, whose sole role is to oversee  
19 litigation for various operating companies. And  
20 different people get assigned different products in  
21 litigation.

22 There is also other individuals, other  
23 lawyers, who actually at times work for the  
24 individual operating companies and provide more sort  
25 of day-to-day type of legal input and oversight. I



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1 don't believe, I wouldn't swear, but I don't believe  
2 they're really at issue in these materials, but there  
3 is sort of a distinction structurally. I mean, there  
4 are other shared services, but for relevant purposes,  
5 that's the way it's worked as long as I go back with  
6 Johnson & Johnson, which is more than a decade. And  
7 my understanding in that more than a decade is that  
8 that structure has gone back further.

9 I don't know, does that answer your  
10 question?

11 SPECIAL MASTER SCHNEIDER: Well, the  
12 people that we're dealing with primarily in this  
13 case, O'Shaughnessy, White, I think the woman's name  
14 was Villani, or something of that sort, they're all  
15 on the general corporate level and provide services  
16 to all of J&J? And are you saying they don't work  
17 for a specific division or subsidiary?

18 MR. BERNARDO: Correct. So, for  
19 example, I mean, I can state firsthand because I've  
20 worked with them, Mr. O'Shaughnessy had  
21 responsibility to oversee hip implant litigation.  
22 And for DePuy, another operating company, as your  
23 Honor has seen, he's had responsibility to oversee  
24 litigation with respect to talcum powder for Johnson  
25 & Johnson Consumer.



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1 I know Ms. Sharko, and I'm not trying  
2 to date her, she goes back farther than I and could  
3 probably give you a list of other operating companies  
4 for whom she has worked with Mr. O'Shaughnessy.

5 He's not an individual who has  
6 responsibility with any particular company or  
7 division. I can distinguish that, and of course I'm  
8 trying to come up with names and I can't, but they're  
9 not in play here, I've worked with individuals in the  
10 operating company who have more day-to-day  
11 responsibility for providing legal advice with  
12 respect to sort of the day-to-day issues in the  
13 company. But that's not what we're talking about.

14 Susan, I don't know if you have more to  
15 add, because I know, again, you go back a little  
16 farther than I do.

17 MS. SHARKO: Yeah, I go back a lot  
18 further than Mr. Bernardo. And I think, Judge, it's  
19 fair to say that where litigation is involved, the  
20 oversight of litigation, that's done within the J&J  
21 law department. And so the lawyers within the law  
22 department, going from the general counsel to what's  
23 relevant here, Mr. Braunreuther to Mr. Kim and to Mr.  
24 O'Shaughnessy, Mr. White, Ms. Warren, all those  
25 people, their responsibility is litigation which is

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1 brought against any operating company. And the  
2 operating companies, being like subsidiaries, the  
3 orthopaedic company, the consumer products company,  
4 et cetera. There are other lawyers who are employed  
5 directly in the operating companies and they don't --  
6 they're not really at issue here.

7 SPECIAL MASTER SCHNEIDER: There are  
8 two --

9 MS. MILLER: I'm so sorry. If I could  
10 just add one tiny caveat to everything they said.

11 Your Honor, there are a few foreign  
12 attorneys involved in some of these documents, in a  
13 handful of documents, and so they would have been  
14 employed by foreign subsidiaries.

15 MR. BERNARDO: Thank you, Jessica. I  
16 forgot that.

17 MS. MILLER: There are a few lawyers,  
18 yeah, like in Saudi Arabia or some of these other  
19 countries. I just wanted to clarify just because,  
20 for accuracy, that they would not be employed by J&J  
21 Services.

22 MS. SHARKO: Right.

23 And then there are also regulatory  
24 lawyers and patent lawyers, some of whom are at issue  
25 here, and they are part of the J&J law department and

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1 they work across the operating companies.

2 So if there was a patent issue, it  
3 would go to the patent lawyer who is part of the J&J  
4 law department.

5 SPECIAL MASTER SCHNEIDER: Is a  
6 regulatory lawyer different than a litigation lawyer?  
7 They're separately classified?

8 MS. MILLER: Yes, your Honor.

9 MS. SHARKO: I guess the short answer  
10 is yes, but those two groups of people do interact  
11 where advice on litigation is necessary. And you'll  
12 see some of that here.

13 SPECIAL MASTER SCHNEIDER: Are there  
14 two J&J Corporate entities, defendants in this MDL?

15 MS. SHARKO: Yes.

16 SPECIAL MASTER SCHNEIDER: One is the  
17 top of the apex, the top of the triangle, that's J&J,  
18 right?

19 MS. SHARKO: Correct.

20 SPECIAL MASTER SCHNEIDER: And then  
21 there is Johnson & Johnson Consumer Products?

22 MS. SHARKO: Yes. And that's an  
23 operating company.

24 SPECIAL MASTER SCHNEIDER: Okay. Is  
25 that a separate legally distinct company?

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1 MS. MILLER: Yes, your Honor. It's a  
2 subsidiary.

3 SPECIAL MASTER SCHNEIDER: Okay. So  
4 the lawyers that are at issue in the documents that  
5 we're looking at, are they employed by J&J or the  
6 consumer company?

7 MS. MILLER: They're employed by a  
8 company called J&J Services that provides services to  
9 the parent company, J&J. None of them is employed by  
10 the consumer company. J&J CI does not have its own  
11 lawyers. There are no lawyers at the business  
12 company.

13 SPECIAL MASTER SCHNEIDER: Okay. What  
14 is an Assistant General Counsel? Is there more than  
15 one? Because it seems like there were so many people  
16 with that title.

17 MS. MILLER: There are several.

18 MS. SHARKO: Yeah, there are several.  
19 It's a series of titles as you work your way up in  
20 the law department. Just like law firms have  
21 partners and senior counsel and counsel and  
22 associates and senior associates, so too in the law  
23 department. And yes, there were and there are a lot  
24 of people at that level.

25 SPECIAL MASTER SCHNEIDER: Is there a

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1 hierarchy in the law department and Mr. Braunreuther.  
2 I apologize for mispronouncing his name, I know he  
3 was the GC, but below him was there -- like where  
4 does O'Shaughnessy fit into the hierarchy? Is he  
5 like the number two or number three person or is  
6 he --

7 MS. SHARKO: Yes. If you look at the  
8 affidavit by John Kim, I think he describes this.  
9 But Mr. Braunreuther was responsible generally for  
10 litigation and then beneath him you have Mr. Kim, and  
11 I would defer to his certification for the exact  
12 words, but he's like the next in line for products  
13 liability.

14 And then below Mr. Kim are kind of the  
15 line lawyers, for want of a better word, that deal  
16 specifically with litigation, all things litigation,  
17 you know, litigation 24/7. And that includes Mr.  
18 O'Shaughnessy, Mr. White, Ms. Warren is one of the  
19 people there. And that's kind of the structure.

20 Now, within that group of people,  
21 O'Shaughnessy, White, et cetera, I think there are  
22 various job levels depending on seniority, et cetera,  
23 but that's a rough outline of how it works.

24 SPECIAL MASTER SCHNEIDER: I think I  
25 know the answer to this question.

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1 Is it J&J's position that people like  
2 O'Shaughnessy and White only performed  
3 litigation-related services?

4 MS. MILLER: One hundred percent.

5 MR. BERNARDO: Absolutely.

6 MS. SHARKO: Yes.

7 SPECIAL MASTER SCHNEIDER:

8 O'Shaughnessy was on this -- I forgot the name of it,  
9 but he was on this big committee, right?

10 If you hold on a moment, I could tell  
11 you the exact name. Hold on one moment.

12 The J&J Worldwide Talc Steering  
13 Committee. O'Shaughnessy was on that committee,  
14 right?

15 MS. MILLER: Yes.

16 SPECIAL MASTER SCHNEIDER: He was on  
17 that committee with it looks like Hopkins, LaBow and  
18 Slivka, right? Those four people?

19 MS. MILLER: Correct.

20 SPECIAL MASTER SCHNEIDER: All right.

21 Is it J&J's position that his role on  
22 that committee was in a litigation role?

23 MS. MILLER: Absolutely. He was there  
24 because of concerns that there was going to be  
25 litigation. Litigation was already starting, right,

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1 about this issue and he was there to gain knowledge  
2 and understand what the impact was going to be on  
3 litigation.

4 Rich, please feel free to chime in.

5 But absolutely for the same reason that  
6 we as outside lawyers inform ourselves about industry  
7 issues, science issues, et cetera, because we need to  
8 understand them in our role in litigation.

9 MR. BERNARDO: I was going to make  
10 that -- highlight that point, Jessica. Which, your  
11 Honor, just by analogy, part of mine and Ms. Miller's  
12 and other outside counsels' role is at times to  
13 participate in meetings and other events, whether  
14 they're conferences that are not litigation, but  
15 we're there to educate ourselves and inform ourselves  
16 and understand the issues so that we could navigate  
17 the litigation so that we could defend the litigation  
18 and understand what happened there.

19 So as you point out, he was not the  
20 only person there. There were other people there who  
21 were there in other capacities who have been deposed  
22 many times in this case. But certainly Mr.  
23 O'Shaughnessy's role, because of what we've all been  
24 explaining, was there solely in his capacity to make  
25 sure that he could understand issues, understand



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1 potential liability, and oversee potential  
2 litigation. Or, depending upon the time frame,  
3 active litigation of this type.

4 SPECIAL MASTER SCHNEIDER: But the work  
5 of the committee, is it agreed that it wasn't solely  
6 related to litigation?

7 MS. MILLER: Absolutely.

8 We are not saying that because Mr.  
9 O'Shaughnessy was sitting in that room, the work of  
10 the Talc Committee suddenly becomes privileged. We  
11 have never said that. We are not asserting that.  
12 But we are saying that the reason Mr. O'Shaughnessy  
13 was there was to inform his duties as a lawyer.

14 I think those are two different things.

15 SPECIAL MASTER SCHNEIDER: So if there  
16 are documents from this committee where, suppose they  
17 discuss -- let me make up a hypothetical without  
18 getting into a specific document -- strategies for  
19 increasing sales in a particular geographic area.  
20 Even though O'Shaughnessy is on the committee, would  
21 J&J take the position that that document is  
22 privileged because he's there in a litigation role?

23 MS. MILLER: This is a document that's  
24 sent to multiple people, in your hypothetical?

25 SPECIAL MASTER SCHNEIDER: It's a

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1 project that the committee is working on.

2 MS. MILLER: I hope nobody is angry  
3 with me, but I sure wouldn't take the position that  
4 that's privileged. But can I take your hypothetical  
5 a step further?

6 SPECIAL MASTER SCHNEIDER: Sure.

7 MS. MILLER: If Mr. O'Shaughnessy  
8 emails me and says: Jessica, something came up at  
9 the conference and I'm worried it will implicate  
10 litigation, or something like that, or if Mr.  
11 O'Shaughnessy emails someone with a legal issue or  
12 his impressions of how something that happened at the  
13 meeting would implicate litigation, then a hundred  
14 percent that would be privileged.

15 MR. BERNARDO: And to add to that, your  
16 Honor, because I think this goes back maybe to  
17 something that you observed at the outset here, I  
18 think without question you identified a number of  
19 documents that were inadvertently produced. We  
20 discussed that and we passed that. But I suspect  
21 that a number of things you're also seeing support  
22 what Ms. Miller is saying.

23 So, for example, just because Mr.  
24 O'Shaughnessy is copied on something where nobody is  
25 talking to him, nobody is asking him a question, we

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1 don't take the position that that is privileged,  
2 particularly like on a situation like this. That's  
3 why there are a number of documents that include him  
4 on it in the production.

5 On the other hand, I don't want to  
6 repeat the scenario, but if you take the scenario  
7 that Ms. Miller just explained where he's speaking or  
8 asking questions, then we would consider that to be  
9 privileged for the very reason that you explained.

10 But I suspect that some of the ones you  
11 are looking at were ones where we would agree that  
12 they were not privileged simply because he was copied  
13 on something.

14 SPECIAL MASTER SCHNEIDER: Mr.  
15 Lapinski, you don't have to weigh in, do you want to  
16 weigh in on this O'Shaughnessy issue?

17 MR. LAPINSKI: Yeah, your Honor, the  
18 only thing I would say is I think what you're hitting  
19 on is one of the issues that we're looking at. There  
20 are documents that include Mr. O'Shaughnessy and Mr.  
21 O'Shaughnessy's, you know, intimately intertwined in  
22 this committee. And the defendants, as Mr. Bernardo  
23 just said, defendants are taking the position that  
24 anytime Mr. O'Shaughnessy comments on something, his  
25 comment is coming from the perspective of wearing a

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1 litigation hat. And it's our position that his role  
2 went -- and comments that he made, things that he  
3 did, go beyond him always wearing a litigation hat.

4 SPECIAL MASTER SCHNEIDER: Well, that's  
5 a gigantic issue, because many, many of the documents  
6 in this group of 156 address that sort of conundrum.

7 And that's a good way to turn to that,  
8 because let's talk about a distinct area of  
9 documents, which, if it's not the biggest area, it's  
10 certainly up there in the 156 having to do with  
11 public notices, press releases, what have you. And  
12 as you know, there are many, many documents with  
13 draft press releases, announcements, what have you,  
14 and J&J is claiming that they're privileged because  
15 of their in-house attorney's comments.

16 So Ms. Miller and Ms. Bernardo, let's  
17 start with a question, plain vanilla hypothetical.  
18 One of these consultants or an in-house consultant  
19 prepares a press release and they send it to Mr.  
20 O'Shaughnessy or Mr. White to review. Those basic  
21 vanilla facts. And counsel redlines the document.  
22 Are those redlines privileged?

23 MS. MILLER: Your Honor, there is a  
24 long line of case law recognizing that when you have  
25 a controversy like this that -- well, so my short

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1 answer is yes, but I want to make clear that we're  
2 talking about a press release that has to do with  
3 talc litigation and the talc controversy?

4 SPECIAL MASTER SCHNEIDER: Yes.

5 MS. MILLER: Okay. So this is a press  
6 release that has to do with the talc controversy and  
7 the talc litigation?

8 SPECIAL MASTER SCHNEIDER: Yes.

9 MS. MILLER: And a lawyer is providing  
10 comments on a press release that has to do with the  
11 talc controversy and talc litigation?

12 SPECIAL MASTER SCHNEIDER: Yes.

13 MS. MILLER: Because that lawyer needs  
14 to make sure that whatever J&J says about the talc  
15 controversy in the talc litigation is legally  
16 accurate -- is accurate, is legally accurate and is  
17 not going to create any legal problems for Johnson &  
18 Johnson.

19 You know, I think the case law is very,  
20 very clear that that's a privileged activity. And I  
21 think the Vioxx case was very clear about that. I  
22 think, if I can give you some case law on that, if  
23 you'd like, I think a very strong case on that is the  
24 Washtenaw case, 2020 Westlaw 3977944. That's a 2020  
25 case.

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1 SPECIAL MASTER SCHNEIDER: Ms. Miller,  
2 let me give you this hypothetical.

3 MS. MILLER: Okay. Can I --

4 SPECIAL MASTER SCHNEIDER: I'm sorry,  
5 finish. Go ahead. Finish.

6 MS. MILLER: Can I finish?

7 I think it's important in this context  
8 to really understand something about this litigation,  
9 if I may. This litigation by plaintiffs has been  
10 litigated substantially in the media. I'm sure  
11 you've heard about, you know, the Reuters article,  
12 plaintiffs' counsel have gone to the media. They've  
13 really attacked Johnson & Johnson in the media.  
14 They've pitched their case to media organizations.  
15 Johnson & Johnson has had to engage in significant PR  
16 to improve its reputation. When Johnson & Johnson  
17 has done that, plaintiffs have tried to go to juries,  
18 they've tried to argue that these PR efforts were  
19 improper.

20 So when you have plaintiffs going into  
21 court and saying that J&J's PR efforts are improper,  
22 clearly the lawyer's involvement is necessary because  
23 the plaintiffs are trying to use these PR efforts  
24 against them. So if there is any question ever as to  
25 whether lawyers' involvement in PR is appropriate,

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1 all you have to do is look at the questioning that  
2 happened of Mr. Gorsky in the Barden trial, the J&J  
3 CO. The questioning that's happened, how many PR  
4 people have plaintiffs tried to depose in this  
5 litigation? They have made PR the centerpiece of  
6 this case. So clearly, we need our lawyers to be  
7 reviewing PR materials because plaintiffs have made  
8 them a centerpiece of litigation.

9 That's all I want to say. Sorry.

10 SPECIAL MASTER SCHNEIDER: Let me come  
11 back and ask a couple of questions.

12 I don't want to take the wind out of  
13 plaintiffs' sales, but you read their brief and I  
14 anticipate when Mr. Lapinski or his team argues,  
15 they're going to say no, no, these press releases  
16 weren't done for primarily, quote/unquote, primarily  
17 for litigation purposes, they were done to make sure  
18 that Johnson & Johnson's puritan image is preserved  
19 and its reputation was preserved.

20 Now, if I find that a particular  
21 document or comments was directed to Johnson &  
22 Johnson's image, reputation rather than to influence  
23 jury selection in Idaho, is that document privileged?

24 MS. MILLER: Your Honor, whether or not  
25 the press releases were done for image and reputation



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1 isn't the question because the press releases were  
2 produced. The drafts were produced. It's the lawyer  
3 comments that weren't produced. The lawyer comments  
4 weren't done for image and reputation. The lawyer  
5 comments were done because the lawyers needed to  
6 review them to make sure that they didn't raise legal  
7 issues.

8           So it's really important to understand  
9 that, and we try to make this clear in our briefing,  
10 that for virtually every one of these drafts there  
11 are dozens of near -- and, you know, Rich told me  
12 that the term "near duplicate" was too technical, but  
13 when we said in our briefing near duplicates were  
14 produced, what we meant was other drafts of these  
15 press releases were produced. Plaintiffs, I mean,  
16 are drowning in draft press releases. Drowning in  
17 draft press releases, final press releases, redlined  
18 press releases. They have lots and lots of this  
19 material.

20           What they don't have are the lawyers'  
21 edits. They have it. So the fact that press -- and  
22 I can tell you, your Honor, that in some of the cases  
23 and I -- one of the hard things in sort of reading  
24 Riddell and trying to understand your rulings is we  
25 didn't have the documents. But I know from other

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1 cases that there have been defendants that have  
2 basically said oh, we had a privilege with these  
3 third party consultants, we can withhold the draft  
4 press releases in full, the entire draft press  
5 release is privileged. We didn't do that here. And  
6 we tried to make that clear in our brief when we  
7 showed you how many of these like APCO and all those  
8 companies' documents were produced. We didn't  
9 withhold the drafts. We just withheld when there was  
10 a lawyer edit.

11 So for every single draft press  
12 release, plaintiffs have similar documents, they just  
13 don't have the edits. So they have everything  
14 related to image and reputation. What they don't  
15 have are the lawyers' comments. I want to make sure  
16 that's a hundred percent clear.

17 SPECIAL MASTER SCHNEIDER: Okay.  
18 Before we turn to Mr. Lapinski, let me just pose  
19 essentially one more hypothetical.

20 They give Mr. O'Shaughnessy a draft  
21 press release and his redline -- I'm making this up.  
22 This is not true. I'm making this up. He has a  
23 redline comment that says if you include this sort of  
24 language, it violates this section of the Federal  
25 Register and could subject us to sanctions. That's a

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1 legal analysis, right?

2 That's privileged, right?

3 MS. MILLER: Yes, sir.

4 SPECIAL MASTER SCHNEIDER: Okay.

5 Suppose the draft goes to Mr.

6 O'Shaughnessy and he says, I'm making this up, I

7 think you should put Paragraph 1 -- I think you

8 should move Paragraph 1 down to Paragraph 3 and move

9 Paragraph 3 up to Paragraph 1. Nonlegal comment.

10 Stylistic. Is that privileged?

11 MS. MILLER: So I think that's a hard  
12 question. And I think the answer is hard.

13 SPECIAL MASTER SCHNEIDER: Well, that's  
14 why I asked it.

15 MS. MILLER: And I think that sometimes  
16 it is very difficulty to parse what is a legal  
17 comment and what is not a legal comment. And I was  
18 reading yesterday the Vioxx ruling, and what the  
19 Vioxx judge said in that circumstance was that if  
20 something is sent to a lawyer and to other people,  
21 the court tried to figure out was this mostly legal  
22 advice, was it mostly business advice. But if  
23 something was just sent to a lawyer and the lawyer  
24 provided comments, the court sort of deferred and  
25 assumed that it was legal advice.

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1                   So perhaps when a lawyer decides, for  
2     example, an associate sends me a brief and I say move  
3     this paragraph up and that paragraph down, are  
4     plaintiffs now entitled to the draft of the brief  
5     because I said move this paragraph up and this  
6     paragraph down, are my comments no longer legal  
7     comments? No, because I said move this paragraph up  
8     and that paragraph down because in my legal judgment  
9     this paragraph is more important for the judge to  
10    see, this paragraph improves our legal case.

11                  So I think that the lawyer's legal  
12    judgment may have been involved in saying that this  
13    paragraph is more important, perhaps this paragraph  
14    is more important from a legal perspective, he wants  
15    to make sure that it's highlighted in the press  
16    release. Because, for example, some of these press  
17    release are about verdicts, right, as you saw. Some  
18    of these press releases were about jury verdicts.  
19    Some of them were about arbitrations. So maybe the  
20    lawyer felt, in his legal judgment, that the one  
21    paragraph about the legal verdict was more important  
22    from a legal perspective than another.

23                  So I'm not sure that it's so easy to  
24    dismiss something as stylistic when a lawyer may have  
25    been saying that the emphasis from a legal

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1 perspective is more important on the later paragraph.

2 SPECIAL MASTER SCHNEIDER: What I hear  
3 you arguing, Ms. Miller, and correct me if I'm wrong,  
4 is that all comments, no matter how substantive, no  
5 matter how stylistic, are privileged?

6 MS. MILLER: I think that that probably  
7 goes too far. In other words, if it's just a -- so  
8 if a lawyer just makes a spelling fix, I suppose a  
9 spelling fix is not privileged. But I think in the  
10 example you gave, if there is a judgment, if it's the  
11 lawyer's mental processes, for example, like I think  
12 the example you gave would involve a lawyer's mental  
13 processes and, therefore, would be work product. I  
14 think there should be deference to if there is some  
15 legal judgment, potential legal judgment or mental  
16 processes involved and something is just sent to a  
17 lawyer in the height of litigation, which is where we  
18 are, in a highly sensitive litigation and public  
19 relations atmosphere, I think there should be  
20 deference that the lawyer's comments are legal unless  
21 they very clearly are not.

22 SPECIAL MASTER SCHNEIDER: So what if  
23 the lawyer's impressions, opinions are primarily  
24 directed to a business issue rather than a litigation  
25 issue? That's not privileged, is it?

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1                   So if the purpose of a press release  
2     primarily is to protect the reputation of the company  
3     so that it continues to sell products -- this product  
4     to mothers who use it on their children, that's the  
5     primary purpose of the press release, and a lawyer  
6     gives his comments, the force of that purpose, is  
7     that privileged? Wouldn't that be the business  
8     purpose?

9                   MS. MILLER: In my experience reviewing  
10    these press releases, I do not believe that any  
11    lawyer was providing advice in order to increase the  
12    likelihood that mothers would buy the product. I  
13    believe the lawyers were providing comments to ensure  
14    that the person who may have been trying to encourage  
15    the public that the product was safe, or whatever,  
16    was doing so in a legally appropriate manner.

17                   So it's hard to answer that  
18    hypothetical for me because I have not seen any  
19    instance where a lawyer was providing legal advice.  
20    That doesn't mean that I haven't seen any instance  
21    where, in the course of providing legal advice, a  
22    lawyer didn't also provide a grammatical fix or a  
23    spelling fix. That's different. But I honestly have  
24    not seen a single instance where I thought a lawyer  
25    was providing business advice.

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1 I can sitting here recall an instance  
2 where a lawyer fixed a spelling, or something like  
3 that. I did not see a single instance where a lawyer  
4 said oh, let's say it this way because the lawyer  
5 thought saying it this way was more likely to attract  
6 consumers. It was always this is a more legally  
7 accurate way to say it. It was always from the  
8 perspective of what's more a legally accurate way,  
9 what is going to ensure that this does not, you know,  
10 bounce back to us from, you know, from plaintiffs'  
11 counsel, who parse every single word in these press  
12 release, we can show you that in deposition after  
13 deposition of PR people at our company.

14 SPECIAL MASTER SCHNEIDER: Mr.  
15 Lapinski, do you want to weigh in on this press  
16 release/public relation consultant issue, because  
17 it's certainly important in this context?

18 MR. LAPINSKI: Yes, your Honor, I  
19 would.

20 And I appreciate that Ms. Miller  
21 recognizes how difficult it is to make these  
22 decisions when you're not actually looking at the  
23 documents, because it is very difficult.

24 To hit on a couple of points. One of  
25 the first things that Ms. Miller said was that the



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1 short answer is yes as it relates to privilege when  
2 it has to do with talc litigation or the talc  
3 controversy. But during her argument, what she's  
4 doing is she's expanding the talc litigation and the  
5 talc controversy to cover anything at all that has to  
6 do with talc. And that goes too far.

7 I don't think the Steering Committee is  
8 looking to take a position that says that if there is  
9 a document that has to do with talc litigation and  
10 there is going to be a statement by Johnson & Johnson  
11 related to talc litigation, for example, responding  
12 recently to the Supreme Court denial of cert in the  
13 Missouri cases, and an attorney makes comments on  
14 that press release that's going to relate to that  
15 particular document, then yes, your Honor, I don't  
16 think you would see us arguing that that's a  
17 privileged document. But when you're dealing with  
18 promotional and marketing material, where the primary  
19 objective of the promotional and marketing material  
20 is to build up Johnson & Johnson's brand name and to  
21 build up and maintain consumer loyalty, those  
22 documents are not litigation documents, those  
23 documents are business documents. And the paradigm  
24 has to shift as far as the review and consideration  
25 to those documents.

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1                   Using your examples, if you have a  
2 document that is sent to John O'Shaughnessy that is  
3 meant to deal with the brand and reputation of  
4 Johnson & Johnson and to build up consumer loyalty  
5 and to make sure mothers still purchase this product  
6 in order to use this product on themselves and on  
7 their children, and that document is sent to Mr.  
8 O'Shaughnessy and he comes back and he says I think  
9 we should move these paragraphs around, you can't  
10 make the assumption that he's moving those paragraphs  
11 around for purposes of litigation or for purposes of  
12 giving legal advice. It's a promotional document.

13                   I think you were right on point, your  
14 Honor, with the examples that you gave. If that  
15 document went to Mr. O'Shaughnessy or to another  
16 attorney and the response and the redline back was if  
17 you word it this way, we're going to be in violation  
18 of a federal regulation, you can't do; or if you word  
19 it in a particular way, it's going to impact the  
20 position that we're currently taking in talc  
21 litigation, so you need to change this, I'd be hard  
22 pressed to try to argue that that's not legal.

23                   But when it's a promotional document  
24 that an attorney is weighing in on with  
25 scrivener-type edits and edits that don't go into

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1 legal substance, then those edits, your Honor,  
2 they're not privileged and those documents are not  
3 privileged.

4 SPECIAL MASTER SCHNEIDER: What about,  
5 Mr. Lapinski, you've seen the privilege log, there  
6 are draft press releases regarding the upcoming  
7 Daubert decision. So there is a draft press release  
8 if the motion is granted and there is a draft press  
9 release if the motion is denied, and that's given to  
10 one of the assistant general counsels and there is  
11 redline comments, is that privileged?

12 MR. LAPINSKI: So, your Honor, I can't  
13 answer that question yes or no without having more  
14 substance to the context. And I'm sure that we'll  
15 get to individual documents that provide more  
16 substance, but I think it depends upon who's copied,  
17 where in the chain the attorney is copied, what the  
18 attorney's comments are, who those comments are  
19 shared with. I think all of that goes into an  
20 ultimate decision as to whether or not something like  
21 that should not be privileged.

22 SPECIAL MASTER SCHNEIDER: It's not  
23 very complicated. The email is sent to the  
24 communications people, they copy the lawyer. The  
25 lawyer gets it. And they want to hold the press

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1 release in their pocket depending on what the ruling  
2 is. So that's all you need to know. And they send a  
3 copy to the assistant general counsel, we'd  
4 appreciate your comments, it doesn't say we want your  
5 legal analysis, it says we want your comments, is  
6 that privileged?

7 MR. LAPINSKI: I think that would  
8 depend upon your definition of the quote/unquote  
9 communication people. If the communication people  
10 are in-house communication people who are J&J  
11 employees that are sending this document to an  
12 attorney for those types of comments, then I don't  
13 think that there is an issue.

14 When included in those communications  
15 are third party consulting organizations that we  
16 don't believe have a relationship that creates a  
17 functional equivalence and you're now bringing in a  
18 third party company whose primary purpose is  
19 marketing and branding, then I think you're running  
20 into a situation where you're waiving privilege  
21 because you're bringing in a third party who has not  
22 been hired as a consultant for purposes of litigation  
23 and whose primary functions that they're performing  
24 on behalf of the organization have nothing to do with  
25 litigation. And that's where I think it changes.

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1 SPECIAL MASTER SCHNEIDER: Suppose it's  
2 the outside company that drafted the two Daubert  
3 press releases, one if it's granted, one if it's  
4 denied, they send a copy to the in-house team, copy  
5 to Mr. O'Shaughnessy. They don't say we want your  
6 legal comments, but we want your comments. Arguably,  
7 there is an implied request for legal advice, and J&J  
8 cites those cases which talk about that notion. Is  
9 that privileged?

10 MR. LAPINSKI: It's a lot more fun  
11 watching Ms. Miller have to provide answers to your  
12 hypotheticals.

13 (Laughter)

14 MR. LAPINSKI: You know, I think --

15 MS. MILLER: I'm happy to answer.

16 MR. LAPINSKI: I think in that  
17 situation, your Honor, if you have a third party  
18 company who sends their draft release on Daubert  
19 rulings pro or con and they send that to the  
20 communications department for whom they've been  
21 working and then the communications department sends  
22 it to the lawyer for comment, I think that the  
23 communication that was sent by the J&J employee to  
24 the lawyer, if the comments are legal comments, then  
25 yes, I think that that would be privileged. But I

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1 think that a third party company like Purple  
2 Strategies contacting directly John O'Shaughnessy and  
3 saying -- or any other lawyer and saying "here is  
4 some draft documents that we've put together, share  
5 with us your thoughts on it," I think that there is a  
6 waiver there. That's a third party who is contacting  
7 and engaging J&J counsel and that's a waiver of the  
8 privilege there.

9 And, your Honor, if and when we're done  
10 with this particular point, I want to be able to go  
11 back to the Steering Committee discussion that was  
12 part of this at the beginning. I just want to be  
13 able to post on that so Mr. Tisi can make some  
14 comments.

15 SPECIAL MASTER SCHNEIDER: Hold that  
16 thought. I don't want to go down too many rabbit  
17 holes.

18 MR. LAPINSKI: Yep.

19 SPECIAL MASTER SCHNEIDER: There is  
20 functional equivalent concept. So as a general  
21 principle, big picture, we know the case law supports  
22 the notion that communications between non-lawyers  
23 that assist the lawyer in rendering legal advice  
24 could be protected.

25 My question, Mr. Lapinski, I'd like

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1 your thoughts on this, is: Do I necessarily have to  
2 find that those third parties are quote/unquote  
3 functional equivalent employees in order to find that  
4 their communications for the purpose of assisting the  
5 lawyer to give legal advice are protected?

6 So throw the functional equivalent out  
7 the window. I know J&J talks about how small their  
8 department is and they're essentially employees, but  
9 throw that out the window. Forget it. Ignore it.  
10 It's admitted they're not a functional equivalent.  
11 Does that necessarily mean that a communication from  
12 that entity can't be privileged even if it assists  
13 the lawyer in rendering legal advice?

14 MR. LAPINSKI: Well, I think, your  
15 Honor, the answer is yes, it's not privileged. And  
16 by way of example, you take the functional  
17 equivalence out of it. Let's assume I'm not a  
18 practicing attorney and I'm just some guy on the  
19 street and I decide to write John O'Shaughnessy and  
20 say, hey, listen, I think this would be a good  
21 response for you to send in a situation where there  
22 is a negative Daubert ruling. And John O'Shaughnessy  
23 looks at it, makes some notes on it, changes it and  
24 say, hey, this guy off the street is pretty darn good  
25 at the way that he writes, I'm going to make a couple



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1 changes and I think this is what we're going to go  
2 with. And he sends me a letter back and says, thank  
3 you very much for what you did, I just want to show  
4 you the edits I made to it and this is probably what  
5 we're going to run with. That's not privileged.

6 SPECIAL MASTER SCHNEIDER: Okay.

7 So suppose you have the in-house person  
8 on the communications team and they want to draft a  
9 press release on the Daubert ruling and they're too  
10 busy and they don't have the resources to do it and  
11 they ask ABC Company, totally independent company, to  
12 either draft it or work with them to prepare it. So  
13 ABC is not a functional equivalent, with the idea  
14 that they're going to send it to Mr. O'Shaughnessy to  
15 bless with comments and a final version. So it's  
16 clear that the ABC Company is providing information  
17 to the in-house attorney for the purpose of him  
18 giving legal advice, but they're not a functional  
19 equivalent.

20 Is it your position that that's not  
21 privileged?

22 MR. LAPINSKI: I think that -- yeah, I  
23 think that it may be privileged, depending upon the  
24 specific context of the writing. And if we go -- if  
25 we go specifically to, you know, the Daubert ruling

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1 and there is a request that someone draft something  
2 in order to respond to the Daubert ruling and it's  
3 being done for purposes of being able to support  
4 litigation, then yes, I do think that there is  
5 privilege there.

6 I think the issue that we run into,  
7 your Honor, is that the descriptions that we have in  
8 the privilege log for these various types of  
9 documents don't allow us to be able to say oh, this  
10 is related to a Daubert hearing. And the same  
11 company who might be drafting something that's in  
12 response to Daubert is also creating a website that  
13 is designed in order to pitch product safety and  
14 build brand loyalty and maintain company reputation  
15 and we don't have any way of being able to, just by  
16 looking at the privilege log, make that  
17 determination.

18 SPECIAL MASTER SCHNEIDER: I agree with  
19 you that the defendants are in a difficult position,  
20 I said that at the outset, because you don't have the  
21 benefit of seeing the documents.

22 But, Ms. Miller, I guess the question  
23 I'm asking is in this context is the focus -- why is  
24 there such a focus on this functional equivalent  
25 issue?

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1                   Should my focus be on whether the work  
2   is done to assist the provision of legal advice  
3   rather than whether or not they're considered an  
4   employee, a functional equivalent employee of the  
5   company?

6                   What am I missing?

7                   MS. MILLER: Well, it's funny because I  
8   sort of agree with you, but we're constrained by the  
9   case law and all the courts look at it in the  
10   functional equivalent context.

11                  In that regard --

12                  SPECIAL MASTER SCHNEIDER: You know, in  
13   Riddell I didn't do that. I don't think I mentioned  
14   functional equivalent in Riddell. And I dealt with  
15   that issue.

16                  MS. MILLER: My sense in Riddell, and  
17   this is where I was going a few minutes ago when I  
18   said it was hard without seeing the documents, but my  
19   sense in Riddell was that there was this third party  
20   PR firm and they tried to argue that all the  
21   documents with that third party PR firm were  
22   privileged, even if they hadn't been sent to lawyers,  
23   as though there was this whole cloak of privilege  
24   around that PR firm. I may have been misunderstood.  
25   So it seemed inapposite.

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1 I wanted to mention, sort of  
2 tangentially related to this, that in plaintiffs'  
3 briefing they cited Bristol Myers as sort of taking a  
4 very narrow view of functional equivalent. And the  
5 Bristol Myers ruling has been really criticized  
6 heavily within the Third Circuit. This goes to my  
7 earlier request just because I sent a list of cites  
8 to you, but can I -- if I may, I wanted to identify  
9 two cases that have really criticized Bristol Myers  
10 and saying that courts -- and this is sort of related  
11 to your idea of the functional equivalent. Rather  
12 than run away from it, courts have taken a very broad  
13 view of what it means.

14 And the first case is Flonase. And in  
15 the Flonase antitrust litigation, 879 F Supp 2d 454,  
16 Eastern District of Pennsylvania 2012, the court said  
17 that courts in the Third Circuit have adopted a broad  
18 practical approach to determining whether an  
19 independent contractor is the functional equivalent  
20 of an employee. And I think that broad practical  
21 approach is sort of similar to what you're saying. I  
22 think they still are using that term, functional  
23 equivalent, but I think the broad practical approach  
24 is similar to the idea that you're talking about now.

25 And another case that I think also is

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1 sort of getting at what you're talking about is Smith  
2 v Unilife. And in Smith v Unilife, which is 2015  
3 Westlaw 667432, Eastern District of Pennsylvania  
4 2015, the court --

5 SPECIAL MASTER SCHNEIDER: I wish you  
6 would cite a New Jersey case.

7 MS. MILLER: It's still the Third  
8 Circuit. Cherry Hill is practically Pennsylvania,  
9 your Honor.

10 SPECIAL MASTER SCHNEIDER: In my old  
11 office, I could almost see the federal courthouse in  
12 Philadelphia. But you know what, you know as well as  
13 I know that that authority is not binding in New  
14 Jersey. So the notion that some decision in the  
15 Third Circuit that's not from New Jersey has some  
16 type of special weight, I don't go for that. I'm  
17 sorry, Ms. Miller, but I think what you're saying.

18 MS. MILLER: I think this quote is  
19 really important nonetheless. It says that the  
20 Bristol Myers approach imposes an undue burden on  
21 corporations in determining how to allocate functions  
22 as to which legal advice may be appropriate. This  
23 unduly burdens the right to secure legal advice at  
24 the risk of losing the attorney-client privilege.

25 And I think that's the point you're

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1 making, which is that if you take a very restrictive  
2 view of the functional equivalent, it basically  
3 forces a company to have to say I'm going to ask this  
4 person to draft a press release rather than that  
5 person to draft the press release because this person  
6 is more likely to be determined a function equivalent  
7 than that person. Whereas regardless of who drafts  
8 the press release, it doesn't really make it a  
9 functional difference in terms of whether an attorney  
10 commenting on it is legal advice or not and whether  
11 that should be considered privileged.

12 So whether it's across the river,  
13 whether it's Pennsylvania or whether it's New Jersey,  
14 I think it is the same point that you were making a  
15 few minutes ago, which is that if a company is using  
16 an independent contractor in the same type of role  
17 that they would be using an in-house PR person, these  
18 cases suggest that Bristol Myers got it wrong and you  
19 should afford privilege for the same reasons that you  
20 would to a communication between a lawyer and an  
21 in-house PR person.

22 SPECIAL MASTER SCHNEIDER: Ms. Miller,  
23 what is Project Fortis?

24 MS. MILLER: So I think actually I'm  
25 going to defer to Rich. He's definitely more

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1 informed about these factual issues than I am. But  
2 basically Project Fortis was an effort to address  
3 some of the issues that had come up in part because  
4 of the harm that was done to the J&J brand name from  
5 the talc litigation in the marketplace.

6 SPECIAL MASTER SCHNEIDER: So is that a  
7 business purpose or a legal purpose?

8 MS. MILLER: I would say it's a hybrid.  
9 Rich, go ahead.

10 SPECIAL MASTER SCHNEIDER: Which is it  
11 primarily? Would you concede it's primarily  
12 business?

13 MR. BERNARDO: Your Honor, if I could  
14 just take a moment and address it.

15 So first, like many names of projects  
16 at companies, they tend to get a life of their own  
17 and be used for different things. And what Ms.  
18 Miller described is very, very accurate as to what  
19 Project Fortis was, but it also transcended a whole  
20 host of things, including, as Ms. Miller was saying,  
21 dealing with issues that are arising in the  
22 litigation and how to manage the company.

23 While there certainly was advice given  
24 in connection with Project Fortis by people who have  
25 the expertise in marketing and corporate



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1 communications, that kind of business advice, to the  
2 extent that it was given to lawyers, I go back to the  
3 comment I made earlier about the overall structure  
4 and role and responsibility. If it was given to  
5 Mr. White or Mr. O'Shaughnessy or Mr. Fitzpatten, it  
6 was given for one purpose and one purpose only, to  
7 get their reaction and their input as to what impact  
8 that could have in the litigation.

9 And I know that, your Honor, because  
10 I've defended witnesses, and I'm actually in the  
11 process of preparing one for this litigation, where  
12 these issues are coming up. And these very  
13 documents, these Power Points, are all being used.  
14 So the fact that somebody is going to a litigation  
15 counsel for advice on what does, I would agree,  
16 appear to be a business document for which business  
17 advice is also being sought, doesn't change the  
18 nature of what that advice is.

19 And we've been talking about  
20 hypotheticals, and I don't want to throw one out  
21 because it's not my place, but I will sort of  
22 rhetorically say: I wonder what this conversation  
23 would be like if we were parsing out what Ms. O'Dell  
24 or Mr. Lapinski or Mr. Tisi communicates to their  
25 clients and whether their edits are legal advice or

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1 are not legal advice? I mean I have a feeling if we  
2 were to do that, we probably would be entitled to a  
3 whole bunch of communications of their clients. And  
4 the fact that the tables are turned and we're simply  
5 talking about a corporate defendant shouldn't really  
6 change the analysis.

7 We're talking about litigation counsel  
8 being consulted for their eye, their legal education,  
9 as to whether something is going to create liability  
10 or otherwise be misused in litigation. It kind of  
11 doesn't matter what their words are or their comments  
12 are, what matters is that they're looking at it and  
13 giving advice from a legal standpoint in the  
14 litigation.

15 MR. LAPINSKI: Your Honor, I was just  
16 going to say that that position makes the  
17 inappropriate assumption then that everything that  
18 gets sent to a lawyer is sent for purposes of  
19 litigation. And that's not what the law is. And the  
20 burden is on the defendant to be able to show that  
21 the document that's being withheld, they have the  
22 burden to show it is privileged.

23 SPECIAL MASTER SCHNEIDER: Mr.  
24 Lapinski, is the question the purpose for which the  
25 document was reviewed or the nature of the comments

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1 of the attorney?

2 So let's assume, just assume for the  
3 sake of argument, that they send it to Mr.  
4 O'Shaughnessy because he's in charge of talc  
5 litigation and they wanted to see how it would impact  
6 talc litigation, but it provides nonlegal comments.

7 So if we just looked at the reason they  
8 gave it to him in the first instance, it would be  
9 privileged. But arguably, I'm not deciding, I don't  
10 know the answer yet, if you look at the comments he  
11 gave, if they're non-substantive, non-legal, arguably  
12 they may not be privileged.

13 So which is it?

14 MR. LAPINSKI: Well, I agree with your  
15 Honor. And that's the reason that in the Valsartan  
16 litigation, it was stated in the Valsartan litigation  
17 that the court isn't supposed to accept the  
18 defendant's representations of what the document is  
19 on face value. The court has to be able to make its  
20 own decision. Because to do otherwise provides the  
21 opportunity for the defendants to shelter and hide  
22 every document. Because they can send every document  
23 that they want to counsel and say, "Hey, counsel,  
24 please give me your comments on this." And it may be  
25 done very well knowing that the comments that are

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1 going to come back are going to be comments that are  
2 directed towards business issues as compared to legal  
3 issues. And the opposing party would never have the  
4 opportunity to be able to find that out, because the  
5 opposing party would be shut off from any type of  
6 analysis like that. And that's not what the purpose  
7 of privilege is.

8 SPECIAL MASTER SCHNEIDER: Let me just  
9 say, Mr. Lapinski, I agree with what I said.

10 MR. LAPINSKI: I was hoping you would,  
11 your Honor.

12 (Laughter)

13 SPECIAL MASTER SCHNEIDER: No, we  
14 can't take at face value the litigant's  
15 self-described description of something. And that  
16 goes both ways.

17 Let me just get back, because this is  
18 so prevalent in the documents. We know there is  
19 publicity about talc and the verdicts that are coming  
20 out. The defendants want to make sure that their  
21 side of the story gets out and not negative  
22 publicity. They draft a press release that they're  
23 going to appeal this verdict and all the science is  
24 against the plaintiffs and we've been studying talc  
25 for X years and there is no asbestos, et cetera, et

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1 cetera. And they draft that press release and they  
2 send it to Mr. O'Shaughnessy.

3 Is that privileged? Is that  
4 privileged?

5 It's related to talc litigation,  
6 obviously. In the back of the defendant's mind, I  
7 can't read their mind, but arguably they're directing  
8 it to the jury pool in the future case. Is that a  
9 privileged document even though it touches on the  
10 litigation?

11 MR. LAPINSKI: Your Honor, I don't  
12 think that I have an issue with that type of document  
13 being a privileged document. Whereas a press release  
14 responds to some type of litigation result or  
15 something that is pending and there are legal  
16 comments that are provided even if the release goes  
17 so far as to say we think our talcum powder, studies  
18 show it does not cause ovarian cancer. If that's a  
19 statement that's made in response to the result of  
20 the litigation, I don't think the issue is there. I  
21 think the issue is that beyond that when on Monday  
22 you make that statement and then on Tuesday, separate  
23 and apart from that statement, you're creating a  
24 website that is designed to talk about the safety of  
25 talc, the absence of asbestos in talc, that's meant

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1 to improve the brand name of Johnson Baby Powder, I  
2 think those two things are day and night. And  
3 anything that would be related to facts about talc  
4 has to be looked at with a skewed eye for what the  
5 real purpose is that it's being sent.

6 SPECIAL MASTER SCHNEIDER: Okay. So  
7 following up, let's get to the Daubert documents.

8 We know that one of the documents  
9 you're challenging is the draft press releases  
10 regarding a prospective Daubert ruling; one, if it's  
11 granted, one if it's denied. It's related to  
12 obviously talc litigation. They send it to  
13 O'Shaughnessy for comments. Why are you challenging  
14 that document?

15 MR. LAPINSKI: We may be challenging  
16 that document and if we flip to the particular tab of  
17 the Daubert one that you're talking about, I'd like  
18 to be able to see it in context because I think that  
19 originally the document may have been challenged  
20 because in the description, I don't think the  
21 original description in the privileged log said press  
22 release related to and legal edits on potential  
23 Daubert press releases.

24 SPECIAL MASTER SCHNEIDER: Ms. Miller,  
25 do you know offhand know that number?

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1 MS. MILLER: Yes, your Honor. It's 15,  
2 80, 94 and 95.

3 SPECIAL MASTER SCHNEIDER: How about  
4 the tab number, do you know offhand?

5 MS. MILLER: Oh, because plaintiffs  
6 don't have it by tab numbers, so you want the --

7 MR. LAPINSKI: No, we have the tabs  
8 that have the Bates numbers and that's what I'd like  
9 to have so I can flip to the tab --

10 SPECIAL MASTER SCHNEIDER: Yeah, me  
11 too.

12 MR. LAPINSKI: -- and be able to use  
13 that in order to look at some different things.

14 SPECIAL MASTER SCHNEIDER: Yeah, let's  
15 do that.

16 MS. MILLER: Those are the tab numbers  
17 I just read. It's 15, 80, 94 and 95.

18 SPECIAL MASTER SCHNEIDER: 94 and 95.

19 MS. MILLER: 15, 80, 94 and 95.

20 SPECIAL MASTER SCHNEIDER: No, I'm  
21 sorry. I'm confused.

22 MS. MILLER: It appears four different  
23 times.

24 SPECIAL MASTER SCHNEIDER: Oh, okay.  
25 Give me the four numbers.



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1 MS. MILLER: 15, 80, 94 and 95.

2 SPECIAL MASTER SCHNEIDER: Okay. Thank  
3 you. Let me pull it out.

4 MS. MILLER: The hypothetical was  
5 missing one fact, though.

6 SPECIAL MASTER SCHNEIDER: Which was?

7 MS. MILLER: That as indicated in the  
8 cover email for tab 94, which plaintiffs don't have,  
9 but we indicated in our description, that an attorney  
10 was one of the drafters of the press release.

11 SPECIAL MASTER SCHNEIDER: So what?

12 That's part of the -- I mean -- okay,  
13 it's a relevant fact, but I'm asking Mr. Lapinski if,  
14 in light of what he said, it's directed to a specific  
15 litigation, why is plaintiff challenging that  
16 document?

17 Yeah, 94 and 95. Perfect. 94 would be  
18 a perfect example of trying to get to the crux of  
19 this.

20 MR. LAPINSKI: So, your Honor, I think  
21 the issue would be this as you look at the Daubert  
22 statement: If you have a J&J lawyer who was making  
23 an edit that says you have to change this and make it  
24 a statement that there is no asbestos, I don't know  
25 that -- I don't know that that's a legal as compared

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1 to a scientific edit. And to the extent that's a  
2 scientific edit, the attorney's not -- the attorney's  
3 the one who is not properly in a position to be able  
4 to make that scientific statement.

5 You know, not all responses are going  
6 to be -- not all edits are going to be legal edits.  
7 Not all responses are, you know, just going to by  
8 themselves be privileged. They have to be -- they  
9 have to be legal comments.

10 SPECIAL MASTER SCHNEIDER: Okay. Let  
11 me get another document. Hold on one moment.

12 76.

13 MR. LAPINSKI: Should I mark down that  
14 tab 15 you found in our favor, your Honor?

15 SPECIAL MASTER SCHNEIDER: No, not yet.

16 (Laughter)

17 SPECIAL MASTER SCHNEIDER: Tab 76.

18 This is a document about a specific  
19 case drafted by one of these consultants. And is  
20 this privileged? It was prepared by a consultant at  
21 the request of an attorney. It's directed to a  
22 specific case.

23 MR. LAPINSKI: The argument here, your  
24 Honor, would be, you know, in this situation I could  
25 argue that it's a third party company that is

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1 involved in the drafting of it, where the third party  
2 company was specifically retained by outside counsel.  
3 Which if you compare G.F. Bunting being retained by a  
4 law firm in order to be able to work in conjunction  
5 with the law firm, I don't know that -- for tab 76  
6 I'm not going to make an argument that that document  
7 is a privileged document. But I think that that  
8 document serves as a good exemplar as to why, when  
9 you get into other documents related to APCO, Purple  
10 Strategies and Blue SJR where they are retained by  
11 the J&J marketing department, their involvement in  
12 drafting responses to specific cases should be looked  
13 at differently.

14 SPECIAL MASTER SCHNEIDER: Okay.

15 I think I've covered all I needed to  
16 cover about the public relations publicity type  
17 documents.

18 Does anyone else have any over comment  
19 they want to make on it? And then we can move on to  
20 another area. I would suggest we just take a short  
21 five-minute break, maybe go to either 12:30 or 1  
22 o'clock. It looks like we're going to go long into  
23 the day, so we can take a lunch break. But I just  
24 want to make sure we've heard everything we needed to  
25 hear generally before we get into specific documents

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1 on the PR issue.

2 MR. LAPINSKI: So I just want to go  
3 back to the Post-it Note that I had put out there  
4 that we'd like to have --

5 SPECIAL MASTER SCHNEIDER: Right.  
6 Right.

7 MR. LAPINSKI: -- comment on the  
8 Steering Committee, and we can do that after our  
9 five-minute break.

10 SPECIAL MASTER SCHNEIDER: Okay.

11 MR. LAPINSKI: The only other point  
12 that I'll bring up, and we have to kind of figure it  
13 out on our side, your Honor, is my youngest is  
14 graduating high school today and 4:30, 5 o'clock-ish  
15 I'm going to have to go in order to maintain my  
16 marriage and my relationship with my daughter.

17 SPECIAL MASTER SCHNEIDER: Well, that's  
18 more important than arguing over privileged  
19 documents, Mr. Lapinski. We'll break. If we have to  
20 continue another day, we will. But it's too  
21 important not to have you present and heard. So you  
22 don't have to be concerned about that. You tell us  
23 when you need to go and --

24 MR. LAPINSKI: And I think it very well  
25 may be that someone else picks up the baton, and it's

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1 not really an issue, but I just wanted to put that  
2 out there that I --

3 SPECIAL MASTER SCHNEIDER: Well, you  
4 can do what Mr. Bernardo and Ms. Miller do and just  
5 pass off the hard questions to somebody else.

6 (Laughter)

7 Let's take a five-minute break and  
8 stretch our legs.

9 (Recess is taken)

10 SPECIAL MASTER SCHNEIDER: Mr.  
11 Lapinski, we're back after a short break.

12 You wanted to discuss a particular  
13 issue. The floor is yours.

14 MR. LAPINSKI: Yeah, what I wanted to  
15 do, your Honor, is I wanted to be able to have Chris  
16 Tisi discuss the Steering Committee that we had that  
17 was part of the discussion earlier, the Talc Steering  
18 Committee that John O'Shaughnessy was a member of.

19 SPECIAL MASTER SCHNEIDER: Sure.

20 MR. LAPINSKI: So if you would allow us  
21 to have Mr. Tisi speak for a couple minutes.

22 MR. TISI: Your Honor, this is Chris  
23 Tisi.

24 I did want to return to your first  
25 point before we got involved in discussions about

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1 press releases and post litigation, you know,  
2 discussion about third parties, et cetera.

3           You asked some, I think, really  
4 important questions about the involvement of the  
5 lawyers in some of the business of talc. And in  
6 response to one of your questions, I think it was Ms.  
7 Miller who said, you know, and there was, if I can  
8 characterize, some trying to put your arms around  
9 what the issue was. And the term that was settled on  
10 was "the talc controversy." Right?

11           And I think it's important to recognize  
12 that the talc controversy goes back decades and deals  
13 with a lot of issues that are not legal in nature.  
14 Whether or not the product would be reformulated, how  
15 they were going to approach different regulatory and  
16 semi regulatory bodies, whether or not to add a  
17 warning about talc and ovarian cancer, whether or not  
18 to fund studies or to criticize studies that were out  
19 there.

20           So when you use the word "talc  
21 controversy," it involves a lot of different things,  
22 including the presence of asbestos or not presence of  
23 asbestos.

24           In response some of those business  
25 issues or scientific issues, there is committees,

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1 formal and informal, that were historically  
2 developed.

3 At some point in the seventies and  
4 eighties there was committees that had different  
5 people, whose names you may have heard; Mr. Semple  
6 and Mr. Ashton, et cetera. And in the mid 1990s some  
7 of these people started to retire and so there was an  
8 opportunity to reformulate committees that would deal  
9 with or to coordinate the overall business practices,  
10 as best we were able to learn.

11 One of those was what you pointed out,  
12 which was the Worldwide Talc Steering Committee.  
13 Now, it's important to know that that committee was  
14 not limited to a discussion of legal advice and legal  
15 cases, it involved a whole spectrum of issues  
16 relating to the talc controversy. And if you don't  
17 mind me -- I mean, I didn't expect to do this, but if  
18 you don't mind if I share a screen for a moment.

19 Am I able to do that, your Honor?

20 SPECIAL MASTER SCHNEIDER: Technically,  
21 sure, if the person can technically do it. But if  
22 you're going to show me the document, which I don't  
23 mean to take the wind out of your sails --

24 MR. TISI: Okay.

25 SPECIAL MASTER SCHNEIDER: -- but the



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1 document that I had in mind was a, let me see, a  
2 September 22nd, 1993 memorandum from D.F. Jones where  
3 it says: The objective responsibilities of the  
4 committees are, and it list one, two, three.

5 Is that what you were going to tell me?

6 MR. TISI: No. No. What I was going  
7 to tell you was that this isn't a situation, and I  
8 think that the -- and this not only goes to documents  
9 that were held for privilege, but also goes to  
10 redaction of documents that deal with certain issues.

11 But in response to one of your  
12 questions or your hypotheticals, I think Ms. Miller  
13 said, well, if somebody then, as a result of the  
14 decision that was made by the committee, goes and  
15 contacts a lawyer and says how does this impact on a  
16 case or some legal issue, that would be legal advice.

17 SPECIAL MASTER SCHNEIDER: Right.

18 MR. TISI: But he was involved with the  
19 actual process of making the decision in the first  
20 instance. And it would be our view, and the document  
21 I was going to show you was a document to show the  
22 membership of the committee --

23 SPECIAL MASTER SCHNEIDER: Go ahead.

24 If you want to put it up, put it up.

25 MR. TISI: I'll identify it by a --

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1 SPECIAL MASTER SCHNEIDER: That's why  
2 we got the professional there.

3 MR. TISI: Right.

4 SPECIAL MASTER SCHNEIDER: Or you're  
5 going to do it?

6 MR. TISI: Yeah. I didn't expect to  
7 have to use it.

8 SPECIAL MASTER SCHNEIDER: Okay.

9 MR. TISI: The document is J&J  
10 00069048, if my eyes are not deceiving me.

11 But the reason why I really wanted to  
12 use this document was to demonstrate to you that the  
13 lawyer was involved in a lot of issues that were not  
14 in anticipation of litigation or involved in  
15 litigation, it was involved in monitoring publication  
16 studies, regulatory actions, to prepare and enforce  
17 Johnson & Johnson's positions on policies related to  
18 source, quality, manufacture of labeling, packaging  
19 and sale of talc, to prepare and keep current on  
20 emergency response action plans.

21 SPECIAL MASTER SCHNEIDER: Mr. Tisi,  
22 there is no question about that.

23 MR. TISI: Okay.

24 SPECIAL MASTER SCHNEIDER: The  
25 document, hold on, the document I have lists the same

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1 three bullet points, so we were talking about the  
2 same thing.

3 But Ms. Miller's point was, let's take  
4 the first bullet point, to monitor publications.  
5 Nonlegal -- I mean, generically it's a nonlegal  
6 purpose, but J&J's position is the role of  
7 O'Shaughnessy was to monitor publications from a  
8 legal perspective.

9 Right, Ms. Miller? That was his role.  
10 He was the legal eyes and ears of the committee. So  
11 even if it was a business document generically, he  
12 still had to look at it with a legal eye. And J&J is  
13 saying that's privileged.

14 What say you?

15 MR. TISI: Are you talking to me or  
16 to --

17 SPECIAL MASTER SCHNEIDER: No, you, Mr.  
18 Tisi. What say you?

19 MR. TISI: I would say if the committee  
20 was involved primarily in making business decisions,  
21 even if he's got esquire after his name, it is a  
22 business decision.

23 Let me give a concrete example. Let's  
24 say the committee decided, you know, there is way too  
25 many publications out there that suggest that talc

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1 may cause ovarian cancer. We think that we should  
2 reformulate the product and use corn starch instead  
3 of talc. Right? That is a business decision that is  
4 being made by the company.

5 SPECIAL MASTER SCHNEIDER: Yes.

6 MR. TISI: So the fact that a lawyer  
7 was involved in making that decision, right, doesn't  
8 mean that he's rendering legal advice in anticipation  
9 of litigation. Right?

10 Same thing if they say we need to  
11 consider putting a label, we need to change the label  
12 to say women should not use the product, you know, if  
13 their genital area. Right? That's a scientific  
14 question. Okay? And the question about whether or  
15 not to do that or not to do that, the extent to which  
16 he was involved in making that decision or objecting  
17 to that decision, to me is not a legal question, it  
18 is a business question.

19 And so he's wearing two hats here.  
20 He's putting on his hat as yes, his title is I am  
21 a -- I am the head of litigation, but he was put on a  
22 committee that was in charge of making legal --  
23 excuse me, making business, scientific and other  
24 kinds of decisions that I, as a lawyer, am not  
25 trained to do. I mean, that's just not what we do.

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1 SPECIAL MASTER SCHNEIDER: Agreed.

2 Now, that's another way of saying that  
3 not all the documents of the committee are privileged  
4 because Mr. O'Shaughnessy is a member. J&J doesn't  
5 dispute that.

6 But, take your example, whether they  
7 should put a label saying don't use it in the genital  
8 area. Mr. O'Shaughnessy, we want your comments on  
9 whether or not we should include that label. Now,  
10 certainly he's not qualified to give a scientific  
11 opinion, but isn't he being asked to look at it from  
12 a product liability perspective? Is this going to --  
13 if we don't do it, will it expose us to product  
14 liability suits? If we do do it, what happens to the  
15 people who used it before the warning change?  
16 Wouldn't that be a legal analysis?

17 MR. TISI: I don't think so at all.

18 If he was involved in actually making  
19 the decision to put a label on a product, that is a  
20 decision that is a scientific and business decision.  
21 If the question was: How does this relate to a case  
22 in which he was involved, that's a separate question.  
23 But if he's actually involved in the process of  
24 making the decision to include a label or not include  
25 a label, that is a decision that they made as a

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1 company that implicates public health, it implicates  
2 science, it implicates all kinds of things. And you  
3 can't separate that out. He was part of a  
4 multi-disciplinary committee.

5 So I would disagree with the suggestion  
6 that that would be rendering legal advice. I'm not  
7 saying in the back of his mind he's not asking the  
8 question: How does this impact on future litigation?  
9 But that's not where he was. If he's sitting in a  
10 chair in a conference room actually making the  
11 decision, that's a business call.

12 SPECIAL MASTER SCHNEIDER: Suppose,  
13 hypothetically, suppose the cover email to Mr.  
14 O'Shaughnessy says: Mr. O'Shaughnessy, are we  
15 legally required to give the attached warning on  
16 whether to use it in the genital area? Is that  
17 privileged?

18 MR. TISI: I'd have to see what it  
19 actually said in the context, but if the question was  
20 we are looking at the science and we believe, as a  
21 committee, okay, we need to take a vote on whether to  
22 add a warning or not, that is not the rendering of  
23 legal advice.

24 I don't know if I'm starting a question  
25 or answering a question, but I don't think that it is

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1 rendering legal advice at all.

2 SPECIAL MASTER SCHNEIDER: Okay. Well,  
3 I suspect J&J would disagree with that, Ms. Miller.

4 MS. MILLER: Your Honor, I think the  
5 entire corpus of attorney-client privilege law and  
6 every attorney-client privilege treatise would  
7 disagree with that because basically what Mr. Tisi  
8 just said is that a lawyer cannot give legal advice  
9 in a business context. And that is exactly the  
10 opposite of what every single case says. A lawyer  
11 can give business advice, can give legal advice on a  
12 business matter.

13 Basically what Mr. Tisi appears to be  
14 saying is that a lawyer cannot advise a client on  
15 whether it should or should not add a label to a  
16 product and that would basically eviscerate the  
17 attorney-client privilege for corporations. So I'm  
18 hoping that's not what he meant, but if that is what  
19 he meant, yes, we obviously disagree with that.

20 MR. TISI: He's not rendering -- if I  
21 could respond.

22 He's not being sent a note by the  
23 committee saying we're thinking about taking this  
24 action, what do you think? He is involved in the  
25 decision-making process about whether in the



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1 hypothetical that you gave to give the warning or not  
2 give the warning. And I think that's a big  
3 difference.

4 MS. MILLER: If you're sitting around a  
5 room and somebody says: So, scientists, do you think  
6 it's a good idea? The scientists' opinion come from  
7 the scientists' perspective. Hey, marketing person,  
8 what do you think from the marketing person  
9 perspective? And then you say hey, lawyer, what are  
10 the legal issues implicated by this warning? Then  
11 whatever the lawyer's views are, those are the  
12 privileged ones. The marketing views aren't  
13 privileged. It doesn't matter whether it's in an  
14 email or whether it's in a conversation, the legal  
15 opinions can't be disclosed, period.

16 MR. TISI: Just because it comes out of  
17 a lawyer's mouth doesn't make it a legal opinion. It  
18 depends on the question being asked and it depends  
19 upon the answer being given, but you can't just  
20 simply wave a magic wand and say it goes in a black  
21 box because it went to a lawyer.

22 MS. MILLER: Of course not, Mr. Tisi.  
23 I feel like Mr. O'Shaughnessy is being set up as a  
24 Superman because we all just agreed that we don't  
25 know anything about marketing, we don't know anything

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1 about science, but Mr. O'Shaughnessy appears to be  
2 this god who you guys think knew everything about  
3 science and knew everything about marketing and he's  
4 this amazing human being, who even though he's just a  
5 lawyer, could run this entire multi-billion dollar  
6 company and could give all this advice on science and  
7 marketing.

8 This guy was a lawyer. He gave legal  
9 advice, period.

10 SPECIAL MASTER SCHNEIDER: Okay. Mr.  
11 Tisi, hold on. Hold on. Time out.

12 Mr. Tisi, the floor is yours. Let's  
13 hear -- we've exhausted that issue about the labels.  
14 Let's hear everything you want to say about this  
15 committee issue.

16 MR. TISI: That's the only point I  
17 wanted to make, is if he was involved in the  
18 decision-making process that, you know, I think we  
19 went down the rabbit hole of dealing with the  
20 warning, but there were multiple different decisions  
21 that were being made over the course of decades  
22 involving this product, and not all of those  
23 questions being presented were  
24 anticipation-of-litigation questions. And so I just  
25 wanted to make clear that that was -- I know there

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1 was some discussion about it earlier and I thought  
2 that factually that might be important for you to  
3 consider.

4 SPECIAL MASTER SCHNEIDER: Okay. Let's  
5 move on.

6 Chris, did you want to say something?

7 MR. PLACITELLA: The only thing I was  
8 going to say, your Honor, is if the question is:  
9 Does the FDA regulation require a warning under these  
10 circumstances, that's probably legal advice.

11 If the question is: Should we do the  
12 study to find out the truth and he says I don't think  
13 we should do the study, that's not legal advice. So  
14 it really depends on the context of the question and  
15 the answer and the information that's being conveyed.  
16 That's all.

17 SPECIAL MASTER SCHNEIDER: Okay. The  
18 last area I'd like to cover before we break for lunch  
19 is this concept of whether or not quote/unquote facts  
20 are discoverable. And as an illustration of this  
21 issue, I identified tab 63, Bates stamp 953.

22 So this is a memorandum which was  
23 prepared by J&J's director of research to John  
24 Beidler and another assistant general counsel. And  
25 as I read the document, it merely gives objective

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1 facts regarding production. No legal analysis, what  
2 have you.

3 Why is this privileged, Ms. Miller, Mr.  
4 Bernardo, these objective, discoverable facts?

5 MS. MILLER: So, your Honor, this  
6 document represents a factual investigation that was  
7 undertaken with respect to a specific case, the case  
8 is listed there at the top of the document, that was  
9 undertaken at the request of counsel. It's both -- I  
10 would say this document is both attorney-client  
11 privilege and work product. It was a factual  
12 investigation that was undertaken, so both for  
13 discovery responses and for case workup. This is the  
14 equivalent of, to put it in perspective, if  
15 plaintiffs asked their client for information about  
16 her use of Johnson's Baby Powder and some of her  
17 experiences with our product and plaintiff sent them  
18 a bunch of materials to help with their factual  
19 investigation and to help them put together discovery  
20 responses, I can assure you that none of that  
21 information has ever been produced to us, no  
22 communications of any sort like that has ever been  
23 produced to us in a single product liability  
24 litigation I've ever been involved in. So this is  
25 understood certainly by plaintiffs when it's

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1 something they're getting from their clients to be  
2 squarely within work product and attorney-client  
3 privilege.

4 I know that plaintiffs in their  
5 briefing said that the work product doctrine is  
6 limited to an attorney's mental impressions. That's  
7 definitely not true. The committee notes to Rule 26  
8 makes clear that the attorney work product includes  
9 materials that are put together by the party and not  
10 just by the attorneys.

11 I can read to you from the Advisory  
12 Committee notes, which state that materials prepared  
13 in anticipation of litigation by a party fall  
14 squarely within the attorney work product. And the  
15 Third Circuit, not just the Eastern District of  
16 Pennsylvania, the Third Circuit itself posited in  
17 United Coal, 839 F2d 958 that the work product  
18 privilege applies not only to documents reflecting  
19 the attorney's mental impressions.

20 So factual investigation materials that  
21 are put together by non-attorney personnel in  
22 preparation for litigation are work product. And in  
23 this case, because the factual investigation  
24 materials are included in a memo that are to a  
25 company lawyer, it's also attorney-client privilege.

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1 SPECIAL MASTER SCHNEIDER: Let me ask a  
2 follow-up question.

3 MR. BERNARDO: I --

4 SPECIAL MASTER SCHNEIDER: Hold on.

5 Mr. Bernardo, did you want to finish  
6 that thought?

7 MR. BERNARDO: I wanted to make one  
8 additional point and to just amplify what Ms. Miller  
9 is saying, but I want to be super careful here  
10 because I'm trying to do this in a general way so I'm  
11 not disclosing content. There is a process, your  
12 Honor, and the process is that plaintiffs in  
13 litigation get to ask questions and they have to be  
14 answered and sworn to truthfully. That's how they  
15 get information. They don't ask for like the  
16 lawyer's files of the underlying facts that they were  
17 investigating for purposes of answering those  
18 questions. That's not our process. And that's what  
19 they're trying to do here.

20 I mean, I'm sure plaintiffs' counsel,  
21 like defense counsel, do investigation, use their own  
22 thought process and mental impressions to figure out  
23 what they want to ask for. And, of course, as part  
24 of that you get factual information. The  
25 responsibility is to provide that through the

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1 appropriate mechanism, not to invade the attorney's  
2 work product and not just get the final answer, but  
3 get sort of what you did to investigate it. And I  
4 just want to make that clear. And again, it's sort  
5 of cryptic in trying not to provide too much  
6 information.

7 MS. MILLER: I think what Rich might be  
8 saying, if I understood it, is that not only does  
9 this reflect the non-attorney's factual  
10 investigation -- maybe this isn't what Rich is  
11 saying, but it's an important point to make. I think  
12 what Rich is saying is that not only does this  
13 reflect the non-attorney's factual investigation, but  
14 it also reflects the attorney's mental processes  
15 because it shows what the attorney asked the  
16 non-attorney to do. Right? Because obviously  
17 Mr. Beidler asked Mr. Jones: Hey, can you go out and  
18 get me all this information, I want it for this case.  
19 And so then --

20 SPECIAL MASTER SCHNEIDER: How do we  
21 know that?

22 Where is the evidence that -- that gets  
23 to my second part of this question about this  
24 document. And this is just representative of what  
25 I've seen in a number of documents. The plaintiffs



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1 have this statement of why this document is  
2 privileged. I have the document in front of me, I'm  
3 not revealing what it says, but all it is is  
4 objective production numbers. That's it. Clearly  
5 discoverable, clearly an objective fact. No  
6 impressions, no opinions. Okay? That's what it is.

7 J&J's argument: This document is  
8 protected by the privilege because it was created for  
9 the purpose of gathering information in anticipation  
10 of litigation. How in the world am I able to know  
11 that just from the document that's in front of me?

12 Is J&J asking me to make that  
13 assumption by just looking at the face of the  
14 document? And then your description, J&J's  
15 description goes: This document is also work  
16 product, quote, because it is a document created for  
17 the purpose of assisting counsel in preparing for  
18 anticipated litigation.

19 How in the world, from this document,  
20 how am I able to make that conclusion?

21 MS. MILLER: Because --

22 SPECIAL MASTER SCHNEIDER: Why should I  
23 accept at face value J&J's description/argument as to  
24 why this is protected? Because I just don't see it.

25 It's a memo, it's a memo from this

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1 gentleman, in-house counsel admittedly, but how am I  
2 supposed to draw the inference, conclusion, what have  
3 you, that this was, one, prepared at counsel's  
4 request? I don't know that. Two, that this is  
5 prepared for litigation purposes? I don't know that.  
6 Are you going to tell me just because that subject is  
7 at the top of the memo I have to draw that  
8 conclusion? I don't know what Gambino versus J&J is.

9 So help me. What am I supposed to do?

10 MS. MILLER: I think, your Honor, at  
11 some point if a memo says that it's about a case, I  
12 don't know how -- I mean, do you think that somebody  
13 faked a subject line? I mean, that's a case that was  
14 pending against J&J --

15 SPECIAL MASTER SCHNEIDER: How do I  
16 know that? How do I know that?

17 Can you tell me where this case was  
18 pending? Is this a prospective case? Is this a  
19 possible case? Is this an actual case? Can you tell  
20 me that?

21 MR. BERNARDO: Yes, your Honor.

22 SPECIAL MASTER SCHNEIDER: You can?

23 MR. BERNARDO: Yes.

24 SPECIAL MASTER SCHNEIDER: Well,  
25 listen, maybe you know the answer. I don't have the

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1 answer.

2 MR. BERNARDO: Your Honor, this one in  
3 particular is a little challenging for the following  
4 reason. I actually don't think the conclusion that  
5 you should draw is challenging, I was about to say  
6 it's challenging to defend without providing some  
7 additional privileged information that I'm obviously  
8 not providing here.

9 If it would please your Honor, we would  
10 be happy to address this a little bit further to  
11 explain a little bit more information. I just put  
12 that out.

13 SPECIAL MASTER SCHNEIDER: Okay. Maybe  
14 when we go -- we separate, we'll discuss this  
15 document. But I have the same issue with a number of  
16 documents.

17 I'm asked to draw a conclusion that  
18 this was prepared in anticipation of litigation or at  
19 the request of a lawyer, but I don't have evidence to  
20 support that. So that's a concern of mine.

21 Chris?

22 MR. PLACITELLA: Yes, your Honor. I  
23 don't know what the document says, but I do know  
24 there was a case Gambino from the early '80s. So I  
25 don't want the court to spend a lot of time on, you

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1 know, issues that --

2 SPECIAL MASTER SCHNEIDER: Okay.

3 MR. PLACITELLA: I'm just telling you,  
4 I know there was a case. I don't know what's in  
5 there, but I'm just saying I know there was a case.

6 SPECIAL MASTER SCHNEIDER: Okay. So  
7 it's a real case. But even knowing that, let's  
8 assume that it is true. One, are purely objective  
9 facts that are provided in a memo work product or  
10 privileged?

11 Two, just because there is a case that  
12 existed at one time, can I legitimately draw the  
13 conclusion that this document was prepared for  
14 purposes of litigation just because that's the  
15 subject of it?

16 I guess the more important issue is  
17 what is plaintiffs' position on whether a memo with  
18 purely objective facts is discoverable even if it was  
19 prepared at the request of an attorney because they  
20 needed it for litigation?

21 MR. LAPINSKI: Your Honor, I think that  
22 if there is -- if there is information that's  
23 prepared specifically at the request of an attorney  
24 for litigation, I think that that information can be  
25 work product information. I don't think that we have

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1 answers to those questions here, though. You know,  
2 even with you having the documents in front of you,  
3 you're unable to draw the conclusions that we're  
4 supposed to be drawing with a lot less information.  
5 We don't know the purpose for which the document was  
6 created. We don't know if the document was created  
7 by Mr. Jones prior to the Gambino litigation and then  
8 for purposes of the Gambino litigation he took a --  
9 you know, he took the information and the facts that  
10 had been created for that memo, dropped it into the  
11 Gambino memo and said hey, this might be useful. We  
12 don't know if it was requested or not requested. We  
13 have no -- there is nothing that allows us to be able  
14 to form, on our side, our opinion that yes, this is a  
15 privileged document that should not be challenged.

16 MR. PLACITELLA: Just because there are  
17 facts doesn't make it something that's automatically  
18 not discoverable. I mean, facts that go to the heart  
19 of what should be -- suppose it says these are the  
20 documents that are available, you know, to the  
21 existence of evidence, and then the evidence isn't  
22 disclosed? I mean, the facts themselves are  
23 privileged, you know, at least from my reading of the  
24 law.

25 SPECIAL MASTER SCHNEIDER: I don't

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1 think J&J disagrees with that, that if the plaintiffs  
2 said to J&J we need these production statistics for  
3 this particular time period that's reflected in this  
4 memo, I don't think they're arguing that those facts  
5 are protected.

6 MR. BERNARDO: That's exactly right.

7 SPECIAL MASTER SCHNEIDER: What they're  
8 arguing is that this document that was, in their  
9 view, prepared at the request of counsel to prepare  
10 for litigation, the document is protected, not the  
11 underlying facts.

12 Am I right about that, Mr. Bernardo?

13 MR. BERNARDO: You're exactly right  
14 about that, your Honor.

15 And as I said, I think there is a  
16 mechanism under the rules to get those facts and the  
17 mechanism is not to seek a lawyer's communication  
18 with his client. Just like I would not say to Mr.  
19 Lapinski, may I have the notes that your client gave  
20 you that you looked at for purposes of evaluating the  
21 facts in putting together either your pursuit of his  
22 case or her case or for purposes of answering  
23 interrogatories. That's what's going on here.

24 But I understand your Honor is  
25 grappling with a different issue, which I know Ms.

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1 Miller is going to explain, which is the proof aspect  
2 of it. But we're not talking about whether facts  
3 developed are discoverable or not, we're talking  
4 about the process and manner in which they are  
5 discovered.

6 MR. LAPINSKI: And, your Honor, to the  
7 extent that the memorandum was created as part of the  
8 quote/unquote process, it would be very easy to be  
9 able to produce an email that is an email that's sent  
10 from John Beidler to Donald Jones that says hey,  
11 Donald, can you do me a favor for the Gambino case,  
12 can you put this information together and forward it  
13 to me so that I can use it in support of the case?

14 (Overlapping Cross talk)

15 MR. LAPINSKI: I'm not done yet.  
16 Counsel, I'm speaking, please.

17 We've seen thousands of entries in the  
18 privilege log that we have not challenged that go  
19 right along those lines. This is an example of one  
20 of those situations where there is no paper trail  
21 like that. And we're being asked to rely upon the  
22 assumption that this was information that was  
23 requested by counsel.

24 Maybe Donald Jones is preparing a  
25 memorandum because he's looking to be able to make



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1 points with his boss and he wants to be able to send  
2 something out that allows him to make points with his  
3 boss, but within that memo he said some things that  
4 are significantly against the interests of the  
5 client. And when the lawyer receives it, the lawyer  
6 says I didn't ask for this, you know, I don't need  
7 this, I didn't want this.

8 We don't know if that's the case, your  
9 Honor.

10 So now, Jessica, you can yell at me.

11 MS. MILLER: I think that the  
12 speculation that's going on here is utterly absurd,  
13 your Honor. This is from 1984. The people who wrote  
14 this memo are long gone from the company. This goes  
15 back to the point in Vioxx that I think is really  
16 important. There is nothing on the face of this  
17 document to suggest that it is anything other than  
18 ordinary work product. There is no suggestion of  
19 anything irregular, notwithstanding Mr. Lapinski's  
20 speculation and creativity here. This is just the  
21 most ordinary, boring memo I've ever seen. Like, if  
22 it weren't for the principles of attorney-client  
23 privilege and attorney work product, who could care  
24 less if plaintiffs had this?

25 But, you know, we're here because we're

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1 lawyers and we believe in the law. And it is so  
2 clear from the face of this document that this is  
3 material that was an investigation of information for  
4 the purposes of the Gambino case.

5 And so notwithstanding all of the  
6 speculation, number one, there is no way to get a  
7 declaration from these people because they're long  
8 gone.

9 And, number two, other than rank  
10 speculation, there is no way to even consider any  
11 possibility that this was done for any purpose other  
12 than the Gambino case.

13 Number three, even if your Honor is  
14 concerned that the attorney didn't ask for this, as I  
15 noted, which I think is pretty clear the attorney did  
16 based on, I think, the second sentence of the memo, I  
17 think the second sentence of the memo implies that  
18 the attorney asked for this.

19 But putting all that aside, it doesn't  
20 even matter if the attorney asked for this because  
21 under Rule 26 I think the law is clear that what a  
22 client does in preparation of litigation is work  
23 product. That was the Advisory Committee notes that  
24 I read earlier. So for all those reasons, I think  
25 this conversation is sort of -- I think we're

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1 losing basic -- we're getting too far away from basic  
2 fundamental principles of work product here.

3 MR. TISI: Can I say one thing?

4 MR. LAPINSKI: Hang on, Chris.

5 Your Honor, the only point that I want  
6 to be able to bring up in regard to what was just  
7 said is if -- again, I'm not looking at the document,  
8 so I have no -- nothing else to do but to speculate.  
9 If we weren't speculating when we were looking at the  
10 six thousand entries on the privilege log, then we  
11 wouldn't be doing our job. We have to try to figure  
12 it out through speculation.

13 If the document itself contains factual  
14 information by and from people who are no longer  
15 alive and we have no other way to be able to get that  
16 information, then even if it is work product, we end  
17 up having the right to be able to get it because it's  
18 not available to us from anywhere else, that factual  
19 information.

20 So I'm just bringing that point up  
21 because Ms. Miller's statement that they can't go out  
22 and get declarations in order to support the facts  
23 that are in there. If it's facts that were provided  
24 by people who are no longer alive and able to give us  
25 those facts, we have a right to the information as

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1 well.

2 SPECIAL MASTER SCHNEIDER: Chris?

3 MR. PLACITELLA: So the analysis here  
4 is substantial need, which is I think what Dan is  
5 alluding to.

6 SPECIAL MASTER SCHNEIDER: Right.

7 MR. PLACITELLA: So if the person no  
8 longer is around, is there a representation by  
9 Johnson & Johnson that the facts that are in this  
10 memo have been disclosed in the course of that case?  
11 If they were disclosed, then an argument can be made  
12 that there is no substantial need. If, however, they  
13 weren't disclosed, then there would be a substantial  
14 need because obviously it was important enough to  
15 make it into this memo.

16 So I think that's actually the  
17 analysis. And the onus should be put on Johnson &  
18 Johnson to represent that the facts in the memo were  
19 actually disclosed in the case.

20 MR. TISI: And actually, your Honor,  
21 not only disclosed in that case, but disclosed in  
22 this case.

23 The question is, in this case do we  
24 have access to the facts that are being communicated?  
25 If this is a 1994 document involving 1994 facts and

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1 we can't get to it, and the only place that those  
2 facts exist is in a document that was sent to the  
3 lawyer, either work product privilege is, after all  
4 as I learned in law school long before I lost all my  
5 hair, is a qualified privilege. It's one that can be  
6 overcome by need. We don't know what's in there, but  
7 it seems like we would be -- we have made a showing  
8 of that. This is not --

9 MR. BERNARDO: One thing Mr. Tisi --  
10 well, everything Mr. Tisi says is important, of  
11 course. But one thing Mr. Tisi just said is very  
12 important.

13 The other balance of work product is  
14 substantial need. What Mr. Tisi said is I don't know  
15 what's in there, but I have substantial need for it.  
16 That just doesn't even make common sense.

17 And again, I want to go back to what  
18 Ms. Miller was just saying. We are so -- this  
19 discussion has so departed from the law, our  
20 profession, the way we work as lawyers, that I can't  
21 even get my arms around it. And I will represent,  
22 because it may make this moot, and I'll highlight  
23 what Ms. Miller was saying when she said this is the  
24 most boring document in the world, yes, these facts  
25 are in there. Plaintiffs have asked for them a

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1 million times, plaintiffs have received them. But  
2 that's not what we're talking about here. We're  
3 talking about the law, we're talking about basically  
4 wiping away the way lawyers and clients work. And  
5 we're talking about trying to ascertain proof of what  
6 happened nearly 40 years ago that is so abundantly  
7 clear from the face of the document.

8 I'm sorry to seem agitated, but I feel  
9 like this discussion has so deviated from what the  
10 purpose of the attorney-client privilege and work  
11 product doctrines are all about, the presumption that  
12 what we all do as lawyers is protected. And there is  
13 a reason for that, to foster open discourse and  
14 dialogue. And we're here trying to wipe it away by  
15 saying I don't know what's in there, but I have  
16 substantial need for it because it's 40 years ago.

17 MR. TISI: That's not what I said.

18 MR. LAPINSKI: Chris, hang on.

19 First of all, that's not what we  
20 stated.

21 Our is statements were: Based upon  
22 what you provided in the privilege log, based upon  
23 the supplemental information that you provided in  
24 your memo, we do not have the ability to be able to  
25 figure out what the purpose of the document was

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1 created for. So anything you say about this  
2 departing from what case law and the legal standard  
3 is, they're not questions that have come from our  
4 end. I think that they're sound questions that have  
5 been presented by the court based upon Judge  
6 Schneider being able to look at the document and  
7 still not figure out whether it should be privileged  
8 or not.

9 SPECIAL MASTER SCHNEIDER: Okay. Last  
10 question before we break for lunch to get this behind  
11 us.

12 Plaintiffs, defendants take the  
13 position that, quote, meaningless non-privileged  
14 portions, close quote, of emails, memos, what have  
15 you, and portions of these documents that are of  
16 quote/unquote no substance, don't have to be  
17 produced. It didn't appear that there is a lot of  
18 this in the documents that I reviewed, but do you  
19 agree with that? Can you tell me if that's something  
20 that I need to rule on?

21 I mean, I have my own opinion whether  
22 these portions are of any substance, but that's a  
23 little unfair because I don't know your case like you  
24 do. And I do know that what may seem insignificant  
25 to the defendants may seem significant to you.



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1                   So what's your position with regard to  
2   that argument made by the defendants?

3                   MR. LAPINSKI: I think you made pretty  
4   much all of my points that I was going to make, your  
5   Honor. I prefer not to have the defendants make the  
6   decisions on my part for whether or not information  
7   is substantive or non-substantive.

8                   There is a reason that the rules  
9   provide for producing documents in redacted form, so  
10   that when there is privileged information, that  
11   privileged information can be redacted and  
12   information that is relevant to the litigation,  
13   whether substantive or non-substantive, can then be  
14   produced and we have the ability to be able to  
15   evaluate it and make a decision as to when and how,  
16   if at all, it may fit into our case.

17                  There are millions of documents that  
18   have been produced in this litigation and I know that  
19   there is not going to be a million exhibits that are  
20   going to be marked at trial. We need to be able to  
21   see this stuff, make our determination on it, and the  
22   case law is not such that it doesn't get produced.  
23   The case law is that it can be produced, it should be  
24   produced, the document should be produced in a  
25   redacted form so that we have the ability to look at

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1 the non-privileged information.

2 SPECIAL MASTER SCHNEIDER: Ms. Miller?

3 MS. MILLER: Your Honor, I think maybe  
4 plaintiffs don't fully understand that we're talking  
5 about a couple documents that basically say like  
6 "have a nice weekend" or "thank you."

7 MR. LAPINSKI: So then what's the harm?

8 MS. MILLER: That's all it is.

9 Because it's a pain in the neck to  
10 start producing them in redacted form.

11 MR. LAPINSKI: For a couple documents?

12 MS. MILLER: Excuse me, Dan. You asked  
13 me not to interrupt you, so maybe you should also  
14 teach me how not to interrupt.

15 MR. LAPINSKI: That's a very good  
16 point. I apologize. I apologize. I'll just leave  
17 it at that.

18 MS. MILLER: It's a lot of work and  
19 it's a lot of expense to produce redacted documents  
20 and literally all we're talking about, I believe, is  
21 two to three documents that either say "thank you" or  
22 "have a nice weekend" and we identified case that  
23 said that it was not required to do so.

24 I do believe you cited one case in  
25 response, but when I went and looked at the case, I

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1 did not believe it stood for the proposition that you  
2 have to produce documents that say "thank you" or  
3 "have a nice weekend" at the top of a long email  
4 chain.

5 Rich, I think you can talk better to  
6 the expense involved.

7 MR. BERNARDO: Yeah, I just want to  
8 clarify one thing that Ms. Miller said. I think she  
9 was referring to the documents that happen to be at  
10 issue in this particular challenge, and I think what  
11 she's getting at, which is correct, is when you think  
12 of the number of documents on a privilege log, I  
13 mean, the judgement that's made is, is this document  
14 privileged or are only portions privileged? If only  
15 portions are privileged, then it's produced in  
16 redacted form, and plaintiffs have seen that.

17 But if a ten-page email is privileged  
18 and the last line of it says THX, there is no reason  
19 to spend the time and money, which is not just on two  
20 or three documents but on thousands of documents  
21 potentially, to go and make that judgment call. So I  
22 just want to point out we're not talking about a few  
23 documents and the expense is significant. And that's  
24 why there is case law that says there is a point of  
25 reason. It's not a judgment call of, well, we don't

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1 think this is really relevant or anything, it's  
2 something. And we've -- Jessica, I think you've  
3 demonstrated that point, we unredacted a number of  
4 them just to show what we were talking about. And  
5 that's why I remembering one of them literally was  
6 THX because I'm thinking the person didn't put in the  
7 A and the N and the K. So that's what we're talking  
8 about.

9 SPECIAL MASTER SCHNEIDER: Okay. I  
10 think now is a good time to break.

11 Let me just tell you my thoughts.  
12 We've covered a lot of ground this morning. Over the  
13 break, I'm going to go through my notes and see if I  
14 have any other generic type, big picture type  
15 questions. My gut tells me the answer is going to be  
16 no, but I just want to make sure. And then we'll  
17 come back after the break and see if either side  
18 wants to talk about any big picture issues.

19 And then if we get those out of the  
20 way, then I'd like to turn to the particular  
21 documents that I identified in the email yesterday  
22 and maybe over the break you should brainstorm about  
23 the best way to handle that. I'm not quite sure what  
24 the answer is.

25 One way is to go right to an in camera

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1 session and discuss privileged information just with  
2 J&J. The other way is to go through each document  
3 one by one, see if J&J needs to address privilege  
4 information in order to address my questions. If  
5 yes, then we'll compile that list and go in camera.  
6 I'm not quite sure which is the best way to do it and  
7 I would appreciate your thoughts when we come back.

8 Pick a document, say 63, here are the  
9 questions I have, J&J. Maybe they can answer them  
10 without revealing privileged information. Fine. Get  
11 it out of the way. Move on to the next document.  
12 Maybe they'll say we need to go in camera. So I  
13 guess my question is should we just immediately go in  
14 camera or go down one by one to find out what  
15 eventually we need to separate on.

16 So give that some thought over the  
17 break:

18 So it's 1:03, why don't we come back at  
19 2 o'clock.

20 Mr. Lapinski, I'm looking to you to  
21 tell us when you think you need to leave. I think  
22 your reason is perfectly justified, so please don't  
23 run the risk of ruining your marriage for this oral  
24 argument. So we'll talk about that when we get back.

25 MR. LAPINSKI: Thank you, your Honor.

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1 SPECIAL MASTER SCHNEIDER: So we'll be  
2 back at 2 o'clock.

3 MR. LAPINSKI: Thank you.

4 (Lunch recess is taken)

5 SPECIAL MASTER SCHNEIDER: If everyone  
6 is back, I guess we can get started.

7 Theresa, let's go back on the record.  
8 We're back from a lunch break.

9 I just have a couple of miscellaneous  
10 questions and then I'd like to turn the floor over to  
11 the parties and any general issues they want to  
12 address and then get their thoughts on the best way  
13 to proceed about the individual documents.

14 I don't think these questions will take  
15 a lot of time. I guess, Ms. Miller and Mr. Bernardo,  
16 what's Patty Cake? There is one document number  
17 eight that refers to Patty Cake.

18 MR. BERNARDO: You're catching me in  
19 the reality, your Honor, of no matter how many times  
20 I look at these documents, it's as if I've never seen  
21 them and I'm forgetting that off the top of my head.

22 MR. PLACITELLA: Does the redaction say  
23 Baker's Man?

24 (Laughter)

25 MR. TISI: He's incorrigible, your

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1 Honor.

2 SPECIAL MASTER SCHNEIDER: Materials  
3 for the Patty Cake product. What's that about?

4 MR. BERNARDO: Jessica, I think you  
5 were about to explain.

6 MS. MILLER: My understanding was that  
7 this was a competitor product that made  
8 misrepresentations about our product and that this  
9 document involves a draft letter written to the  
10 manufacturer of that product complaining about  
11 misstatements regarding our product in their  
12 promotional materials.

13 SPECIAL MASTER SCHNEIDER: So Patty  
14 Cake is another talcum powder?

15 MS. MILLER: I do not think it was  
16 talcum powder. I think it was some other product,  
17 competitor non-talc product.

18 MR. PLACITELLA: As I recall, Patty  
19 Cake was a competitor product that made non-talc  
20 powder and advertised that talc was unsafe. And J&J  
21 took issue with that.

22 SPECIAL MASTER SCHNEIDER: Got it.

23 MS. MILLER: So the document at issue  
24 is a draft letter written by a J&J lawyer complaining  
25 that the Patty Cake product misrepresented our



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1 product. And I think it was, you know, a typical  
2 letter, a cease-and-desist-type of a draft letter.

3 SPECIAL MASTER SCHNEIDER: The next  
4 question I had was about document number 11. In the  
5 description it refers to a talc certificate. What is  
6 that?

7 MR. LAPINSKI: So, your Honor, you went  
8 to 11?

9 MR. BERNARDO: Your Honor, a  
10 certificate, or a COA, which is referenced later on  
11 in the document is a Certificate of Analysis, which  
12 is a routine testing document, probably hundreds of  
13 which are in the document log.

14 SPECIAL MASTER SCHNEIDER: So a talc  
15 certificate is a certificate of analysis?

16 MR. BERNARDO: Right. It's not unique  
17 to talc, it's just the name of the document that  
18 reports the results of testing.

19 SPECIAL MASTER SCHNEIDER: Got it.

20 Number 18 attaches photographs and I  
21 guess my question is: Why are those photographs  
22 protected? And since they're older photos from 1994,  
23 would that satisfy the substantial need test?

24 MS. MILLER: So there is no substantial  
25 need test for attorney-client privilege. That would

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1 only apply to work product.

2 This document involves a trademark  
3 matter where another company was infringing on the  
4 J&J trademark. I can't imagine why it would  
5 possibly, even if this were work product, why  
6 plaintiffs would possibly have any substantial need  
7 for it. It was a Mexican company that was creating  
8 packaging that looked like J&J packaging. And the  
9 reason the photographs were privileged is that they  
10 were attached to a memo that was addressing potential  
11 litigation against this Mexican company that was  
12 creating packaging that was similar to J&J packaging.  
13 And so it was an illustration on a legal memo  
14 comparing the labels to show how the Mexican label  
15 was infringing upon the U.S. label.

16 SPECIAL MASTER SCHNEIDER: Last  
17 question.

18 Generally not referring to a specific  
19 number, there are a number of documents providing  
20 factual information to what looks like a J&J patent  
21 attorney. J&J asks to infer from that, just from the  
22 provision of the letter and the letter itself, that  
23 it was for the purpose of obtaining legal advice.

24 What support is there for that?

25 Can I necessarily draw that conclusion

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1 simply because factual information is provided to an  
2 in-house patent attorney? Is the only reason factual  
3 information is provided to someone of that position  
4 for legal advice? If not, how do I determine the  
5 purpose for which the information was provided  
6 because there is no other background provided?

7 So let's hear J&J and then I want to  
8 hear if plaintiff has a position on that.

9 MS. MILLER: So, your Honor, I actually  
10 spent some time thinking about that yesterday because  
11 I noticed in that list of documents that there are a  
12 lot of patent documents.

13 The first thing I wanted to tell you is  
14 that most of those documents are memos to Mr. Tatlow,  
15 a patent lawyer. Unfortunately, in 2014 Mr. Tatlow  
16 passed away. So we had no ability to get an  
17 affidavit from Mr. Tatlow. So that was off the  
18 table.

19 In looking at the case law, which I  
20 looked at extensively yesterday, the case law, as I  
21 read it, appears to suggest that when there is a memo  
22 to a patent lawyer, it is assumed that the memo is  
23 for purposes of obtaining patent information, of  
24 obtaining patent advice.

25 I did find a case where the court said

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1 it wanted to ensure that the underlying information  
2 had been made available to plaintiffs in some other  
3 context.

4 So last night I requested an associate,  
5 a poor associate who did not get a good night of  
6 sleep, to go through the production and make sure  
7 that for the four patent documents that you had  
8 highlighted in your email that the underlying facts  
9 about the formulations and everything like that that  
10 was included in those memos had been provided to  
11 plaintiffs separately in the production. And he  
12 basically sent me a list of Bates numbers where that  
13 information has been provided to plaintiffs in a  
14 non-privileged context. And I got that at basically  
15 7 AM.

16 So what I can do, if that would  
17 interest your Honor, if that would help you make a  
18 determination, is we can send you, at the end of this  
19 hearing, we can send you the Bates numbers showing  
20 that the factual information related to the memos  
21 that were sent to the patent lawyers had been  
22 produced in other contexts to plaintiff.

23 And the case that gave me the idea of  
24 doing that was the Rohm and Hass versus Brotec Corp.  
25 case that was affirmed by the Federal Circuit at 815

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1 F. Supp 793.

2 MR. LAPINSKI: Jessica, can I interrupt  
3 you for a second? I'm just getting a lot of  
4 background noise from somewhere and I don't know  
5 where.

6 MS. MILLER: It's probably not me  
7 because I'm like the one sad person who's in the  
8 office.

9 MS. O'DELL: I think it's someone from  
10 Golkow.

11 I think it's a technical person from  
12 Golkow. I sent them a chat.

13 (Off-the-record discussion)

14 MS. MILLER: So I'm not sure where I  
15 was before that, but basically in the Rohm and Haas  
16 case the court said that it appears to be, you know,  
17 a memo sent to counsel. It is only addressed to  
18 counsel. There are comments of a technical nature.  
19 It would be apparent that those comments of a  
20 technical nature are offered tests as counsel -- in  
21 counsel's work, but then the court goes on to say  
22 that to the extent there is any concern that somebody  
23 tried to sweep the technical data under the  
24 privilege, that the party ensure that the technical  
25 information had otherwise been produced.

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1                   So that is the reason why I went to  
2   this extra effort of having someone else stay up  
3   (Laughter) and do the extra effort of finding other  
4   documents where this information had been produced.  
5   And so we can send those to you at the end of the day  
6   if you would find that helpful.

7                   MR. PLACITELLA: Does the associate  
8   need representation?

9                   MR. BERNARDO: I was going to say, that  
10   also might explain why we got notice from that  
11   associate at eight this morning.

12                   (Laughter)

13                   SPECIAL MASTER SCHNEIDER: Ms. Miller,  
14   I would accept your representation and proffer,  
15   unless there is an objection from plaintiffs.

16                   Do you want to be heard on that patent  
17   issue, plaintiffs?

18                   MR. LAPINSKI: I do, your Honor. And I  
19   think the only point that I would bring up in regard  
20   to that is while there were a small handful of  
21   documents that were used as exemplars for purposes of  
22   in camera review and ongoing meet and confers, if  
23   there are other documents that fall within that silo,  
24   we'd like to see, one, those privileged documents  
25   identified so we know which ones they are. And then

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1 sent to you, just as is being done right now or being  
2 represented will be done right now by Ms. Miller, the  
3 identification of where the facts in those privileged  
4 documents have been produced.

5 SPECIAL MASTER SCHNEIDER: Ms. Miller,  
6 you'll take care of that?

7 MS. MILLER: Sure. Anthony will be  
8 thrilled to know his weekend is going to get ruined  
9 too.

10 SPECIAL MASTER SCHNEIDER: Okay. So  
11 that completes my general questions.

12 I'd like to open the floor, see if  
13 anyone has any what I describe as sort of a general  
14 issue that doesn't directly implicate one specific  
15 document, although we can use that as an exemplar.  
16 And after we complete that discussion, then I'd like  
17 your thoughts on how to handle the particular  
18 documents.

19 So I just want to open the floor. Are  
20 there any other issues of a general nature that  
21 either the plaintiffs or the defendant want to raise  
22 that haven't previously already been discussed?

23 MR. LAPINSKI: Your Honor, on behalf of  
24 the Steering Committee, I'd like to bring up an issue  
25 that we can discuss.



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1                   Going back to the beginning of the  
2 call, we had talked about the number of documents  
3 that were on the privilege log and the fact that the  
4 defendants had committed to downgrade and produce  
5 certain documents since they were no longer being  
6 challenged by us because they were going to be  
7 produced.

8                   The defendants produced documents  
9 earlier this week, but a couple issues with the  
10 production.

11                   One, I believe that the documents that  
12 were downgraded were produced along with another  
13 batch of documents being produced. So they weren't  
14 just here are the previously privileged documents  
15 that are downgraded and being produced to you. So  
16 it's my understanding we kind of have to go on a  
17 search now in order to find those documents.

18                   The second thing is that a lot of the  
19 documents that were downgraded and produced were  
20 produced in redacted form and the entire document is  
21 redacted. So what we've essentially gone to is  
22 downgrading that goes from a  
23 no-you-can't-have-it-because-it's-privileged to  
24 yes-you-can-have-it-but-you-can't-read-it-because-it'  
25 s-fully-redacted. And that's -- it's an issue

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1 especially in the context of the upcoming  
2 O'Shaughnessy deposition because now we have  
3 documents that were downgraded that we believe relate  
4 to Mr. O'Shaughnessy that are fully redacted and  
5 weren't the subject of what we're talking about  
6 today.

7 So what we would propose, and then I'll  
8 stop talking, is we would ask that in this situation,  
9 in light of the fact that we're on a pretty quick  
10 schedule here with the O'Shaughnessy deposition, is  
11 that we would ask that the defendants identify the  
12 O'Shaughnessy documents that have been downgraded  
13 and/or redacted and that they be able to present  
14 those documents to you for in camera review so that  
15 you have the ability to be able to review them and  
16 within the context of everything we're doing here  
17 today, you can make a ruling on those documents so  
18 that we know for the next week or two what we're  
19 dealing with.

20 SPECIAL MASTER SCHNEIDER: Are you  
21 talking, Mr. Lapinski, about the set of documents you  
22 just received?

23 MR. LAPINSKI: Yes, your Honor.

24 SPECIAL MASTER SCHNEIDER: And what  
25 you're asking is for the -- in that collection for

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1 the -- of just the O'Shaughnessy documents to be sent  
2 for in camera review?

3 MR. LAPINSKI: Yes, your Honor.

4 And I think that we can also piggyback  
5 on top of that some additional O'Shaughnessy  
6 documents that are in the -- that have been  
7 identified as redacted documents, take a step back on  
8 that.

9 The redaction log that the defendants  
10 have provides to us includes nothing more than a  
11 beginning Bates stamp number, an end Bates stamp  
12 number and a statement that the document has been  
13 withheld because of privilege or because of work  
14 product. It gives us no description as to, you know,  
15 what it is, why it's being withheld. It just simply  
16 states work product and/or attorney-client privilege.

17 And as we've been going through these  
18 documents, we have found additional documents that  
19 would relate to John O'Shaughnessy that have either  
20 partial or full redactions that we'd also like to be  
21 able to present to the court -- or not that we want  
22 to present, that the defendants would present to the  
23 court for in camera reviews so we know whether or not  
24 they're going to be available to us for use in  
25 deposition.

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1 SPECIAL MASTER SCHNEIDER: So you all  
2 know that, before we hear from Johnson & Johnson, you  
3 all know that O'Shaughnessy is going to be deposed in  
4 the state talc cases starting on the 22nd. There is  
5 a very good chance, in my view, that that deposition  
6 is going to be carried over to the 23rd. And it  
7 remains to be seen whether it's going to carry over  
8 to the 24th.

9 I know a date was set for the  
10 O'Shaughnessy deposition in the MDL. I'm looking at  
11 my calendar now. Was that scheduled to start on the  
12 22nd, Mr. Lapinski?

13 MR. LAPINSKI: Yes, I believe so, your  
14 Honor.

15 MS. O'DELL: The 29th and 30th, your  
16 Honor.

17 MR. LAPINSKI: I'm sorry, 29th and  
18 30th.

19 SPECIAL MASTER SCHNEIDER: Oh, you  
20 changed it. 29th and 30th. I'm sorry.

21 MR. LAPINSKI: Is for the MDL.

22 MR. TISI: With a spillover to the  
23 first, if necessary, your Honor. We don't know how  
24 it's going to go and so we kind of reserved two days,  
25 but a spillover to the third.

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1 SPECIAL MASTER SCHNEIDER: Okay.

2 Well, what I relayed to the parties in  
3 the state case, Ms. Miller and Mr. Bernardo know  
4 this, is ultimately whether the dep spills over to  
5 the third day really depends on how much substantive  
6 testimony is taken or whether all the time is going  
7 to be taken up with argument. But other things being  
8 equal, it would seem to me that two days should be  
9 more than enough to take O'Shaughnessy's deposition.

10 Obviously, he's an important witness.  
11 I anticipate privilege objections and that will take  
12 up some time, but unless something really unusual  
13 happens in terms of argument, I don't really see a  
14 need for it. If you're going to ask me to rule on it  
15 for a third day, it may not apply to the plaintiffs  
16 in the MDL, but what I said to Mr. Block, and  
17 hopefully he's still on the phone, is if this  
18 deposition is as important as you say it is, why are  
19 we taking it in June 2021 instead of, you know, the  
20 1990s or the 1980s or the 2010s? So why did you  
21 wait? Why did the plaintiffs wait so long to take  
22 it? So that would be my general view if I'm asked to  
23 rule on that third day. So if I was the plaintiffs,  
24 I think I would do my best to wrap it up in two days,  
25 if I'm asked to rule on it.

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1 MR. LAPINSKI: So, your Honor, just for  
2 clarification, we weren't asking for you to make any  
3 kind of ruling as to whether or not our deposition  
4 can carry from a second day to a third day. We have  
5 the ability to put up an example of one of the  
6 documents that I was just talking about. The issue  
7 that we have, your Honor, is that we had documents  
8 that were downgraded by defendants from the privilege  
9 log to the redaction log and then they were produced  
10 to us this week. And the documents that were  
11 produced to us are just fully redacted, they're now  
12 fully redacted documents. So instead of being a  
13 privilege document, it's now --

14 SPECIAL MASTER SCHNEIDER: What was the  
15 purpose of that?

16 MR. LAPINSKI: I don't know. And the  
17 reason that I -- the reason that I'm asking or what  
18 we're -- the reason that we're putting this on the  
19 table now is in hopes that we can identify those  
20 types of documents by Bates number, ask that the  
21 defendants produce those to you in camera so that  
22 when we do the O'Shaughnessy deposition, we have had  
23 your input on those types of documents as to whether  
24 or not they are privileged.

25 SPECIAL MASTER SCHNEIDER: Here is my

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1 suggestion.

2 I'm very comfortable that I'm familiar  
3 with the legal and factual issues at this point,  
4 having reviewed all of these documents and having  
5 studied the law in this area. Especially, I'll  
6 follow up with the additional citations that have  
7 been given to me. So I personally have no problem if  
8 I get a document, ruling right away, you know, a day  
9 or so, whether it's privileged or not. I don't know  
10 if I can get an opinion out in such a short time.  
11 But if the parties can get the documents to me by X  
12 date, I can assure you that I can rule on those  
13 documents in a day or two and I can say sustained,  
14 overruled, blah, blah, blah. I just won't have time  
15 to write an opinion, you know, justifying in the  
16 detail I like to justify it, the basis of my ruling.  
17 If that would be satisfactory, I would welcome that.  
18 Because I hope, I hope that O'Shaughnessy is only  
19 deposed once.

20 You know my position in this and every  
21 other case I ever handled is if there is a materially  
22 relevant document that should have been produced at a  
23 deposition that wasn't produced, the questioner  
24 should have an opportunity to follow up at another  
25 deposition. Nobody wants that. I'd rather the



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1 witness only be deposed once. So let's get all the  
2 documents on the table and, you know, take your best  
3 shot. So I'm very perfectly willing to do that. I  
4 don't think it's a heavy lift given my familiarity  
5 with the subject matter by this time.

6 So if you want to get a collection of  
7 documents together just for O'Shaughnessy and get it  
8 to me by X date, I can assure you I can get a ruling,  
9 you know, in a day or two before the deposition. But  
10 it won't be accompanied by a written opinion  
11 justifying the ruling. And then I guess you can  
12 decide whether or not you want to abide by it.

13 MR. LAPINSKI: And I appreciate that,  
14 your Honor. And the reason that we brought it up is  
15 because we're not the ones that have the documents in  
16 hand. So we have to put it out on the table here in  
17 order to get some input as to how and when you want  
18 the documents produced by defendants so you can make  
19 those rulings.

20 MR. BERNARDO: Your Honor, may I  
21 briefly address this?

22 SPECIAL MASTER SCHNEIDER: Absolutely.

23 MR. BERNARDO: There is a little bit of  
24 confusion I would like to cut through, and again I  
25 say all of this at the risk of going too far into the

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1 weeds, so I'm going to keep it at a very high level  
2 and if your Honor has questions, we can address them.

3 What went on by way of production was  
4 the defendant's way of keeping everybody around the  
5 country up to date. We've been working with  
6 plaintiffs both in New Jersey and in the MDL where we  
7 have more real-time and certainly made separate  
8 productions to them of the privilege downgrades with  
9 respect to the documents they challenged, the  
10 documents we've been discussing. I feel like we're  
11 sort of recycling that process. And I appreciate  
12 that plaintiffs don't understand that, which is why  
13 I'm trying to explain that.

14 The materials, as I understand it, that  
15 went out were catching everybody else up to what Mr.  
16 Lapinski and his folks already have. So we're not  
17 talking about them first.

18 I apologize, I forget the  
19 circumstances, but I think the issue that he's  
20 referring to with the document that was entirely  
21 redacted was for a specific reason, a specific  
22 request. But I obviously can't address that as I sit  
23 here right now. I'm happy to work with them on that.

24 And then finally, you know, to state  
25 the obvious, this isn't the perfect world and while I

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1 think it would be great to make sure we've gotten  
2 each and every last document, I don't think that  
3 anything that's in this production that might have  
4 Mr. O'Shaughnessy's name on it has not already been  
5 considered by plaintiffs. I kind of have the  
6 inability to say that with a hundred percent  
7 certainty. But we acknowledge if there is something  
8 in there that after the fact comes up that somehow  
9 materially would have affected the deposition, we're  
10 going to have to address that. We've made best  
11 efforts to front all of that. I'm working with Mr.  
12 Tisi to further front it. I just want to be careful  
13 of not like having a paper chase here, if you will,  
14 and turning this into a bigger project than it is  
15 because we are dealing with a substantial number of  
16 documents.

17 I just want to point out, I don't think  
18 there is an issue here. We will work with Mr.  
19 Lapinski, as we have before, to try to cut through  
20 that. And in fairness to them, Mr. Tisi sent me an  
21 email on this yesterday and I just did not have the  
22 opportunity to write back and to address what I just  
23 said, but I don't think it was an issue.

24 MS. O'DELL: I have an example, your  
25 Honor, to help illustrate this, and if you'll allow

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1 me to put it up, your Honor, I'll do that.

2 SPECIAL MASTER SCHNEIDER: Sure. Of  
3 course.

4 MS. O'DELL: Let's see if this will  
5 allow me to share me screen here.

6 This is an example of a document that  
7 we received yesterday. And there was a production of  
8 about -- looks like it was about 3200 documents. And  
9 of that production, about five hundred were  
10 downgraded documents or privileged documents that  
11 we -- some of which we had challenged and they were  
12 downgraded. So we sort of set aside our challenge  
13 believing they would be produced in a reasonable way,  
14 and this is what we got. It's --

15 MR. BERNARDO: Leigh, I believe this is  
16 one of the documents that is before Judge Schneider.  
17 I don't memorize the documents, but I believe I've  
18 seen this document in the last several days as one of  
19 the ones in the challenge.

20 MS. O'DELL: Well, our point is, it was  
21 taken -- we had challenged it. It was supposedly  
22 downgraded. Now it's been, quote, produced, but it's  
23 completely redacted. And so these are some of the  
24 issues that we're going to need your Honor's  
25 assistance on. And, you know, with that, just

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1 showing the example, I'm happy to defer to Dan.

2 I don't want to usurp what he was  
3 saying.

4 MR. LAPINSKI: So, your Honor, what  
5 we'd like to be able to do is have defendants provide  
6 us -- I think Leigh said it was 3300 documents. From  
7 the 3300 documents that were produced, identify those  
8 documents that have John O'Shaughnessy tagged on them  
9 so that we can then have documents provided to you in  
10 camera for you to make a decision as to whether or  
11 not redactions like you just saw are, in fact,  
12 appropriate and whether the information is  
13 privileged.

14 SPECIAL MASTER SCHNEIDER: Do you want,  
15 Dan, the ruling before O'Shaughnessy's deposition?

16 MR. LAPINSKI: Well, that would be  
17 ideal, but I think the -- that's one of the reasons  
18 that we're bringing it up now, is because we want to  
19 be able to have this process expedited and want your  
20 support in getting this process expedited.

21 SPECIAL MASTER SCHNEIDER: It seems to  
22 me that there is a choice here. Whatever the parties  
23 want to do is fine with me.

24 One, you could handle this sort of in  
25 the non-accelerated basis, either wait for the

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1 court's ruling, supplement the in camera documents  
2 you want the court to rule on, and then I'll rule on  
3 it with an opinion and with a detailed explanation.  
4 With the proviso that if the issue comes before me,  
5 you know how I'm going to rule if relevant material  
6 documents are produced after a deposition that should  
7 have been produced before. And then if you come back  
8 and say we want to depose Mr. O'Shaughnessy on these  
9 additional documents we didn't have at the deposition  
10 for this finite period of time without ruling on a  
11 specific issue, that's going to be granted.

12 The alternative is, if you can get the  
13 documents compiled and to me say by Tuesday or  
14 Wednesday, I can get you a ruling in a day or two.  
15 But in practical terms, it can't be accompanied by a  
16 detailed opinion explaining the rulings. It would  
17 say objection sustained; objection overruled because  
18 blah, blah, blah, blah, blah. But there wouldn't be  
19 an opinion on it.

20 So pick your poison. What do you  
21 prefer? What do the defendants prefer?

22 You want to caucus on it and just let  
23 me know what you want to do?

24 MR. BERNARDO: Since no one is  
25 speaking, I just wanted to give plaintiffs an

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1 opportunity. Your Honor, I just don't think what Mr.  
2 Lapinski is proposing, while I would love to try to  
3 work with him, is practical or reasonable to expect  
4 to get done. It's sort of, for lack of better --  
5 it's like massaging it down to its finest point and I  
6 don't think that can be done.

7 I'm comfortable with the nature of the  
8 material and, spoiler alert, to the extent that your  
9 Honor overrules any of the privilege claims that we  
10 determine not to appeal, I think plaintiffs are going  
11 to be very disappointed, as Ms. Miller said, some of  
12 this is particularly boring stuff. I wish that were  
13 the standard because if the standard were we don't  
14 care about it, we probably would save an awful lot of  
15 time. Unfortunately, that's not the legal standard.  
16 So we have to assert attorney-client privilege.

17 SPECIAL MASTER SCHNEIDER: You know, I  
18 don't necessarily disagree with you. I'm not  
19 immersed in this litigation like you are.

20 MR. BERNARDO: Of course.

21 SPECIAL MASTER SCHNEIDER: And I'm not  
22 ruling on proportionality and relevance, but if I  
23 was, as to some of the documents, not all of them,  
24 some of the documents, you know, my favorite  
25 expression is, is the juice worth the squeeze. But I



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1 understand plaintiffs' position, they don't know  
2 what's in the documents.

3 MR. BERNARDO: And I do as well, your  
4 Honor. I'm just simply -- since the Zoom was silent,  
5 I thought I would at least communicate defendant's  
6 position, which is we think it's appropriate to  
7 proceed with Mr. O'Shaughnessy's deposition with the  
8 record as we have it and with the documents that are  
9 before your Honor. We are the ones and Mr.  
10 O'Shaughnessy are the ones who are assuming a  
11 significant risk here, I suppose, because your Honor  
12 may disagree and say no, I think this is material and  
13 he needs to come back. We don't think that would be  
14 the case. I'm just trying to weigh that, your Honor,  
15 against the practical reality. And I'm not being at  
16 all critical of plaintiffs or us, but as your Honor  
17 saw, this whole process, because we're working  
18 remotely, has been very, very difficult. Plaintiffs  
19 lists are replete with duplications and  
20 misunderstanding of documents.

21 Our lists and the material we're  
22 sending you, because we're printing remotely, are  
23 things that don't have traction. This is a much more  
24 complicated process from a logistics standpoint than  
25 it ordinarily would be. And I'm just trying to be

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1 realistic in my years of experience dealing with this  
2 as to what can and cannot be reasonably accomplished  
3 in advance of the deposition. And from the  
4 defendant's perspective, again, happy if there is a  
5 couple of documents to work with Mr. Lapinski, but I  
6 just don't think we can achieve the level of  
7 perfection that's being sought in advance. So that's  
8 the defendant's position.

9 MS. MILLER: I would just also add that  
10 we've been on the screen for several hours, we have  
11 several hours left to go. I would like to think that  
12 what we're doing is productive. And so whatever  
13 these other documents are, there are probably  
14 productive discussions to be had about them that  
15 wouldn't be had. So I'm not sure that it would be a  
16 fulsome review if you're not able to ask questions or  
17 follow up. They may raise other legal issues that we  
18 haven't had an opportunity to really air. So I think  
19 that's a concern as well.

20 I think --

21 SPECIAL MASTER SCHNEIDER: I don't  
22 really see, Mr. Lapinski, I understand the  
23 practicalities of the situation, but I don't really  
24 see how plaintiffs are going to be prejudiced. There  
25 is a robust record of O'Shaughnessy documents,

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1 clearly. And how many times can I say it? You're  
2 not going to be prejudiced if materially relevant  
3 documents have to be produced after the deposition  
4 that you didn't have before the deposition.

5 Yes, there are documents that, in my  
6 view, without knowing the history of the case, aren't  
7 terribly important, but there are some documents that  
8 do look important and if I was in your shoes I would  
9 want to see. I don't know how I'm going to rule on  
10 that, but you can be assured if the issue comes  
11 before me and that those important documents are  
12 produced afterwards, and you say, judge, protect our  
13 interests, we think we need a finite time to redepose  
14 O'Shaughnessy, if I had to rule on the issue, you  
15 know how I'm going to rule. I don't think either  
16 side should be prejudiced. That's just my general  
17 feeling, Mr. Lapinski.

18 I guess I would defer to J&J on this  
19 issue because, they're right, there are so many  
20 logistics that are going to go into Mr.  
21 O'Shaughnessy's deposition, to add on to that  
22 reviewing another set of in camera documents, it's  
23 going to be done if that's what the parties want to  
24 do, but certainly would add to the problematic nature  
25 of the logistics.

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1 MR. BERNARDO: Besides, your Honor, for  
2 the selfish reason I can't afford to lose two more  
3 associates.

4 (Laughter)

5 MR. LAPINSKI: You know, from the  
6 plaintiffs' perspective, we always have the  
7 anticipation that we're going to find a document that  
8 says I ordered the code red. And, you know,  
9 hopefully we'll come across it. I appreciate your  
10 position and what you've had to say and we'll work  
11 with counsel in coming up with something that  
12 effectively bring us to have this issue addressed.  
13 And if we get additional documents that are relevant  
14 and feel that we should have the right to be able to  
15 go back and re-notice a deposition of John  
16 O'Shaughnessy, then we'll be in touch with you about  
17 that.

18 SPECIAL MASTER SCHNEIDER: You won't be  
19 prejudiced, Mr. Lapinski.

20 MR. LAPINSKI: Thank you very much,  
21 your Honor.

22 SPECIAL MASTER SCHNEIDER: Are there  
23 any other general issues?

24 MR. LAPINSKI: Well, you know, I think  
25 kind of to build a little bit on something that Ms.

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1 Miller brought up, and it goes with argument that  
2 we've been having here and how argument that we're  
3 having here may pertain to other documents that  
4 weren't put in front of the court, we wanted to kind  
5 of have a discussion as to a process for being able  
6 to apply decisions that are made by you today to the  
7 various silos of documents that we might be dealing  
8 with that are similar to documents that you ruled  
9 upon today and that have been put before you.

10 SPECIAL MASTER SCHNEIDER: Well, here  
11 is my suggestion, just thinking off the top of my  
12 head. I'm going to do my best when I rule in  
13 writing, if it's feasible, to give directions on how  
14 to apply it to the other set of documents. So for  
15 example, like I did in -- I can't remember the name  
16 of the case. It was a big business dispute. I had  
17 to rule on seven categories and I said documents --  
18 training documents of this sort have to be produced.  
19 So I'll try to do that.

20 There may be instances in this case  
21 where, and this troubles me but these are the facts  
22 of life, where I may say that J&J hasn't produced  
23 sufficient information to satisfy its burden of proof  
24 on the privilege and work product issue. That sort  
25 of ruling is a stand-alone ruling and it really can't

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1 apply to any other document.

2 MR. LAPINSKI: Right.

3 SPECIAL MASTER SCHNEIDER: I hope to  
4 avoid that, but it may be inevitable. A lot will  
5 depend on when we separate what J&J tells me, because  
6 you can sense I have a concern about justification  
7 for some of the claims that they're making. And if  
8 they can't justify them, it means they haven't  
9 satisfied their burden and the documents get  
10 produced. That isn't a great precedent for the other  
11 sets of documents, but as to, for example, the press  
12 releases, if I say -- I don't know how I'm going to  
13 rule, but, you know, it's implicit that they give  
14 legal advice and blah, blah, blah, all the attorney  
15 comments on the press releases are privileged, don't  
16 have to be produced, that gives J&J direction what to  
17 do with the other documents. Right? So maybe we'll  
18 have a reasonable time frame after the ruling comes  
19 out where you identify any additional documents you  
20 want to review, meet and confer, and then we can go  
21 through the same process again, although we won't  
22 need additional briefing as to the legal issues. I  
23 don't know if that helps.

24 MR. LAPINSKI: Chris, do you have  
25 anything you want to weigh on with that, or weigh in

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1 on with that?

2 MR. PLACITELLA: I mean I don't. I  
3 think this is a decision for Johnson & Johnson on how  
4 they want to proceed. We flagged the issue and  
5 that's fine.

6 MR. LAPINSKI: Your Honor, the next  
7 thing that you had asked about was what our thoughts  
8 were on the best way to proceed this afternoon and as  
9 we're here.

10 SPECIAL MASTER SCHNEIDER: Yes.

11 MR. LAPINSKI: I have confirmed that I  
12 need to have my exit strategy so that I'm out of here  
13 at 4 o'clock. So that leaves us an hour and 15  
14 minutes. And what I would propose is that maybe we  
15 go through some individual documents. It will kind  
16 of start to give us a flavor as to how these  
17 documents are going to be handled. That might allow  
18 us to check some additional documents off that will  
19 not have to be addressed at a future time. And then  
20 at 4 o'clock, you know, if you want to have in camera  
21 conversations with counsel for J&J at that time, then  
22 maybe that's the best use of all of our time. And  
23 again, I apologize. My daughter's graduation was  
24 just recently switched to in-person as compared to  
25 any type of virtual or other graduation at all, so I



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1 apologize for that.

2 MR. PLACITELLA: Well, I think it's  
3 important that we have a ruling from a federal judge  
4 that you were allowed permission to go to your  
5 daughter's graduation. You can use that going  
6 forward.

7 (Laughter)

8 SPECIAL MASTER SCHNEIDER: So ordered.  
9 Well, let's start and we'll see how far  
10 we get.

11 MS. MILLER: Your Honor, just briefly,  
12 may I say one quick thing?

13 SPECIAL MASTER SCHNEIDER: Of course,  
14 Ms. Miller.

15 MS. MILLER: Leigh O'Dell, the document  
16 that you put up on the screen is tab 99 in this  
17 review. I am not sure why you got a redacted  
18 version. I have asked an associate what's going on  
19 and I'm trying to figure that out, but it is in the  
20 court's current review pile. It is tab 99.

21 MR. BERNARDO: Actually, I believe it's  
22 also in another tab because I think you --

23 MS. MILLER: It's at least. How's  
24 that, Rich, it's at least tab 99.

25 MR. BERNARDO: That's why I recognize

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1 the document, because I've seen it so many times in  
2 the binder that we sent to Judge Schneider.

3 SPECIAL MASTER SCHNEIDER: That was one  
4 of the documents that I had questions about as well.

5 So let's then go down individual  
6 documents. Let's see how it goes and play it by ear.

7 Why don't we start with number eight.

8 Number seven, I'm going to skip because  
9 we -- wait a minute. Wait a minute. Yeah, number  
10 eight, because number seven we received a supplement  
11 which answered my question.

12 Number eight. This is the Patty Cake  
13 document.

14 Okay?

15 Draft letter written by the in-house  
16 counsel.

17 Mr. Bernardo, you described this as an  
18 in-house -- I'm sorry, a cease and desist letter.  
19 Why is this privileged? I mean, it was designed to  
20 be sent to a third party. I don't even know if this  
21 is the final version of the letter.

22 It says it's privileged because it  
23 concerns matters that are the subject of or could  
24 become the subject of litigation. Is that the  
25 standard for privilege?

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1 MR. BERNARDO: First, your Honor, I  
2 just want to make one clarification and one point and  
3 then I'm going to turn it over to Ms. Miller.

4 The clarification, I think she refers  
5 to the cease and desist comment, is characterizing  
6 it, but I do want to point out, which is stated in  
7 the description of it, by analogy, your Honor. So I  
8 write a draft letter to my client for them to send  
9 out because they ask me as a lawyer to put something  
10 together reflecting my legal advice and input as to  
11 the best way for that letter to go out. The fact  
12 that a letter was actually sent, which wouldn't  
13 itself be privileged, the final letter, doesn't make  
14 the final letter privileged, but it certainly makes  
15 my draft as a lawyer privileged.

16 But I'm going to turn it over to Ms.  
17 Miller, who may have --

18 SPECIAL MASTER SCHNEIDER: Was the  
19 final version of this letter produced?

20 Was it sent?

21 MR. BERNARDO: Give me one moment, your  
22 Honor.

23 Oh, I think that's part of the issue  
24 with this document, is it's unclear if it was. And a  
25 decision may have been made for legal reasons not to

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1 send this letter out. And for the very reason why,  
2 and everybody on this Zoom has probably written  
3 drafts of letters and decided they're not going to do  
4 that, the fact that it was or wasn't sent doesn't --

5 SPECIAL MASTER SCHNEIDER: Yeah, but  
6 I'm not sure that's really fair, Mr. Bernardo,  
7 because it's J&J's burden of proof. I know it's a  
8 1999 document, but I don't think it's really fair to  
9 say, well, we don't know if it was sent or not, so  
10 assume it wasn't sent and, therefore, it's  
11 privileged. I'm not sure that's fair.

12 MS. MILLER: I don't think that's what  
13 Rich is saying. Rich is saying whether it was sent  
14 or not, the draft is privileged. If it was sent, we  
15 absolutely would have produced the final letter. But  
16 in either instance, the draft is privileged. All the  
17 case law says the draft letter is written by  
18 attorneys on privilege. This is a draft letter, the  
19 client asked the attorney to draft a cease and desist  
20 letter, a draft cease and desist letter is inherently  
21 privileged. And it's sent --

22 SPECIAL MASTER SCHNEIDER: Ms. Miller,  
23 Ms. Miller, I thought that when I asked this  
24 question, the answer was we don't know if this was a  
25 draft, we don't know if this letter was sent out.

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1 Hold on. Hold on.

2 Suppose this letter wasn't changed one  
3 word and just the only difference was it was put on a  
4 letterhead. That's not a draft letter, that's the  
5 final letter.

6 MR. BERNARDO: Your Honor, I apologize,  
7 I want to clarify what I said because I think I may  
8 have confused it.

9 What I was saying is, we know this is a  
10 draft, you can tell that because it's unsigned. It  
11 wasn't sent, it's not on letterhead. So we know this  
12 document is a draft. So I just want to clarify that.

13 SPECIAL MASTER SCHNEIDER: Suppose the  
14 court's ruling is the final version of this letter  
15 has to be produced. J&J comes back and says we can't  
16 find it, we don't know what the final version is, how  
17 do we then know that this version isn't the final  
18 version?

19 MS. MILLER: With all due respect, your  
20 Honor, I think that would be an erroneous ruling.  
21 This is a draft letter attached to a communication  
22 from a lawyer to his client. The lawyer is asking  
23 his client to review the draft letter. This is no  
24 different if Ms. O'Dell sent a letter to her client  
25 or plaintiff saying here is a draft letter I want to

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1 send Rich Bernardo or Jessica Miller, can you review  
2 this letter for accuracy. There is no way Ms. O'Dell  
3 would be turning over to us a draft letter that she  
4 would be sending to her client for accuracy.

5 That's all this is. It's a draft  
6 letter attached to an email to a communication from a  
7 lawyer to his client. Again, this is pure  
8 attorney-client communication. It is attached to a  
9 communication to a client saying here is a draft  
10 letter. I can't go into the rest of the email at the  
11 risk of waiver, but it's very clear that he's  
12 seeking -- I mean, I can't say any more because I'm  
13 going to start waiving this. But this is clearly a  
14 communication between a client and counsel.

15 MR. BERNARDO: And, your Honor, I guess  
16 there would be no difference if -- I don't mean to  
17 pick on Ms. O'Dell here, but she's front and center  
18 on my screen.

19 MS. MILLER: Yes, that's why I said it.

20 MR. BERNARDO: It would be -- Mr. Tisi,  
21 it would be no different if they drafted a legal  
22 brief because their client said I want to see what  
23 this looks like. You look at it, your Honor, and you  
24 say it sure looks fine to me. Do we know whether it  
25 went out? We don't know that, was 20 years ago. But

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1 you're not going to take something -- because it may  
2 not have gone out. They may have looked at it and  
3 their client may have said bad decision, I don't  
4 think this should go out. That doesn't mean that it  
5 should be privileged.

6 And the process is such that if there  
7 were a final letter and this did go out, it's  
8 certainly within the scope of the searches that have  
9 been done and it would have been produced. But as it  
10 stands right here, it's unquestionably an unsigned,  
11 not-sent draft of a document drafted by a lawyer  
12 whose legal advice was sent. And in that respect no  
13 different than a brief that was drafted and --

14 SPECIAL MASTER SCHNEIDER: Okay. Let's  
15 move on. But there is no dispute that the final  
16 version of this letter, whatever it is, is  
17 discoverable.

18 MR. BERNARDO: No dispute.

19 SPECIAL MASTER SCHNEIDER: Okay.

20 MR. BERNARDO: Well, when I say -- a  
21 final sent version. I just want to be clear that  
22 we're talking about -- and I don't know what "final"  
23 means, but if this were sent out, absolutely.

24 SPECIAL MASTER SCHNEIDER: All right.

25 Next.



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1                   Number 11. This is a series of emails.  
2   My first question is, the very first email, very  
3   first email in the string, Bates number 5946,  
4   December 18, 2018 4:34 AM. Why isn't, starting with  
5   this one email, why isn't just this email  
6   discoverable?

7                   MR. BERNARDO: I'm sorry, your Honor,  
8   could you -- I was flipping to get the document so I  
9   want to be on the right page that you're on.

10                  SPECIAL MASTER SCHNEIDER: Bates number  
11   5946.

12                  MS. MILLER: Which is tab 11.

13                  MR. BERNARDO: I just want to  
14   understand which particular email he was referring  
15   to.

16                  SPECIAL MASTER SCHNEIDER: Yes. The  
17   first email in the series. 12-18-18, 4:34 AM.

18                  Standing alone, why isn't just this  
19   email discoverable?

20                  MR. BERNARDO: Your Honor, I think we  
21   could explain that from the content of the letter of  
22   the email, and maybe without your reading it out  
23   loud, I can point you to it, if that might help you.

24                  SPECIAL MASTER SCHNEIDER: I think  
25   you're talking about the sentence -- I know the

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1 sentence you're talking about, right above the bolded  
2 letters sentence, right?

3 MR. BERNARDO: That is one of the  
4 reasons that explains the circumstance of the  
5 first-in-time email and why that's privileged.

6 MS. MILLER: It's part of an entire  
7 ongoing communication. And you are correct, your  
8 Honor, that in the bottom email, if you didn't have  
9 the entire chain, you wouldn't know that it's an  
10 ongoing request because it is only specified in the  
11 second email. But it is all part of the ongoing  
12 requests. And he only mentions it in the second one.  
13 I understand what you're saying, but it is --

14 SPECIAL MASTER SCHNEIDER: Ms. Miller,  
15 Ms. Miller, the way that sentence is phrased that you  
16 and I are referring to, do you want me to infer that  
17 the first email was prepared at the request of an  
18 attorney as well?

19 MS. MILLER: Yes, because of that  
20 fourth word in the second -- in that sentence in the  
21 second email. I think the fourth word.

22 And also the fact that Rich and I have  
23 seen 45 of these emails is how we know it. But it's  
24 because of that fourth word.

25 Is that correct, Rich?

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1 MR. BERNARDO: Yes.

2 MS. MILLER: That fourth word. In  
3 other words, they send this and then he's like I've  
4 got another one. You understand?

5 SPECIAL MASTER SCHNEIDER: I got the  
6 argument.

7 In the description that's provided to  
8 the plaintiffs, it says: This was a communication  
9 for the purpose of gathering information for an  
10 attorney to render legal advice.

11 How do we know that?

12 Let's assume -- it's granted, let's  
13 assume that the attorney requested this information.  
14 Now you want to take the next step and say it was  
15 necessarily for legal advice. Why should I make that  
16 assumption?

17 MR. BERNARDO: I think, your Honor,  
18 that might be something we could more easily explain  
19 to you ex parte because it requires pointing out  
20 other things in the particular document. We've been  
21 doing a good job of talking code so far, but it's  
22 getting a little difficult.

23 SPECIAL MASTER SCHNEIDER: Okay.

24 Number 12. There is Attorney White's  
25 legal comments. J&J uses the term quote/unquote

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1 legal comments. Right? I'm not quite sure what that  
2 means, but that's the term that is referenced in the  
3 description.

4 Am I to assume that every one of  
5 Attorney White's comments are quote/unquote legal  
6 comments?

7 MR. BERNARDO: Your Honor, the answer  
8 to that lies in the same argument that we've made  
9 before. I think we can substitute what I and  
10 Ms. Sharko and Ms. Miller said with respect to Mr.  
11 O'Shaughnessy and put Mr. White's name in there and I  
12 think we would simply be rehashing the same  
13 arguments. I think we've made that point. We  
14 haven't talked about him that much, but you can say  
15 the same thing. And, in fact, he took the baton from  
16 Mr. O'Shaughnessy when Mr. O'Shaughnessy retired in  
17 talcum powder litigation.

18 SPECIAL MASTER SCHNEIDER: Is it fair  
19 to assume that the final version of this document was  
20 produced?

21 MR. BERNARDO: About 135 times.

22 (Laughter)

23 It's been the subject of ten  
24 depositions that I've defended, it's been the subject  
25 of cross-examination at trial. There are very few

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1 documents that have had as much air time as this one.

2 SPECIAL MASTER SCHNEIDER: So I take  
3 that as a yes?

4 MR. BERNARDO: Yes.

5 MS. MILLER: And if you look at the  
6 bottom of that description on the cover sheet, it  
7 says: Non-privileged versions of this document  
8 without Mr. White's comments have been produced to  
9 plaintiffs, EG.

10 SPECIAL MASTER SCHNEIDER: Okay.

11 MR. BERNARDO: It just didn't say 135.

12 MS. MILLER: That's why we went with  
13 the E-G, Rich.

14 MR. BERNARDO: Got it.

15 SPECIAL MASTER SCHNEIDER: 21. Now,  
16 this is not a legal document, right? This is the  
17 issue we were discussing this morning.

18 MS. MILLER: That is correct, your  
19 Honor. And I think this is actually a great example  
20 because this is one of the documents I was thinking  
21 about when plaintiffs were talking about the fact  
22 that why are lawyers commenting on nonlegal  
23 documents. And obviously I can't describe what the  
24 edits are here, but these edits are all to ensure  
25 that this document complies with the law, that this

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1 document complies with, you know, regulations, that  
2 this document is accurate in terms of the company's  
3 legal and regulatory obligations.

4 I don't think I can really go beyond  
5 that in my description, but I think this is a perfect  
6 example of why a lawyer needs to review a document  
7 like this. This is one of the ones where you  
8 couldn't see the changes until that document we sent  
9 yesterday because of the way everything was copied,  
10 but the thing you got yesterday should show like one,  
11 two, three, four, five, six, seven. It gives like a  
12 list of the comments.

13 SPECIAL MASTER SCHNEIDER: But --

14 MS. MILLER: All of those comments in  
15 my mind are focused on -- I'm trying to find a way to  
16 say this that doesn't waive any privilege issues,  
17 they're all focused on accurate statements from a  
18 regulatory perspective. They have nothing to do with  
19 business. This person isn't qualified to give  
20 business advice. They have nothing to do with  
21 marketing. Not one of these statements has anything  
22 to do with promoting the product or increasing the  
23 promotional value of this material. They're all  
24 about accuracy from an FDA perspective. They're not  
25 about like, oh, more people will buy the product if

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1 we use this word instead of that word. They're all  
2 about from an FDA perspective, let's use this word  
3 instead of that word.

4 SPECIAL MASTER SCHNEIDER: By way of  
5 example, could you turn to page 10 of this document.

6 MS. MILLER: That's the page I'm on.

7 SPECIAL MASTER SCHNEIDER: Okay. Do I  
8 take it this is a summary of the comments?

9 MS. MILLER: Yes.

10 SPECIAL MASTER SCHNEIDER: Okay. So  
11 look at number one. It appears to me that the  
12 attorney is just making a factual comment, that the  
13 attorney is not providing any legal advice in the  
14 comment.

15 What say you?

16 MS. MILLER: Yeah, I guess I disagree  
17 because the attorney is making sure that if that word  
18 had been used, it would have been inaccurate from a  
19 legal perspective. That's not marketing or business  
20 advice. That word would have been -- it would have  
21 been -- from a legal perspective, improper to use  
22 that word for the reasons she explains.

23 So that's exactly what a lawyer is  
24 doing. A lawyer would say you're overstating this  
25 from a legal perspective if you use that word and



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1 that's why we shouldn't use that word.

2 It's so hard to do this in this random  
3 speak because I'm trying not to, you know, be  
4 specific about what it says. But I think this is a  
5 perfect example of what a lawyer would say: Hey,  
6 don't use that word because that word suggests  
7 something from a regulatory perspective that's not  
8 accurate.

9 SPECIAL MASTER SCHNEIDER: Isn't the  
10 lawyer just checking the accuracy of a fact?

11 MS. MILLER: No.

12 SPECIAL MASTER SCHNEIDER: They're not  
13 giving legal advice?

14 MS. MILLER: No. No. I completely  
15 disagree. I think the lawyer is saying that if you  
16 use that word, it's inappropriate from the  
17 perspective of a lawyer. The lawyer is making sure  
18 that this person is not overstating the -- I'm very  
19 worried that if I go any further I'm waiving  
20 privilege.

21 SPECIAL MASTER SCHNEIDER: Let me give  
22 you an example, Ms. Miller.

23 Suppose, hypothetical, the document  
24 says on June 19th, 1970, we had a meeting. And the  
25 attorney says well, no, it wasn't the 19th, it was

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1 June 21st, 1970. The attorney is just correcting a  
2 fact. You're saying that's legal advice?

3 MS. MILLER: I don't think that's what  
4 this attorney is doing. I don't think that  
5 hypothetical is apposite to this situation.

6 MR. BERNARDO: Your Honor, could I just  
7 address, again we can talk about this in camera, but  
8 just to put one more point on it while we're on this  
9 document. Obviously, one of the standards in  
10 regulatory law is truthful and not misleading,  
11 correct? Truthful and not misleading. So in terms  
12 of marketing, what is truthful, what is puffery? I  
13 mean, you're attempting to slice this to a fine  
14 degree in terms of what a lawyer is commenting on. I  
15 kind of go back to the flip side of this if we were  
16 talking about plaintiffs' counsel. If they were  
17 making edits or comments to things that their clients  
18 are saying, I'm not going to -- I don't know, maybe I  
19 am going to challenge that given this conversation.  
20 But ordinarily, I wouldn't challenge that we're  
21 entitled to see their advice as to a word choice  
22 that's used, and that's because they're lawyers  
23 representing their clients and we give regard to  
24 those word choices as part of their legal  
25 representation.

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1 I mean, maybe the tables will be turned  
2 if plaintiffs are agreeable to providing us this  
3 information from their client. I haven't heard that  
4 yet, but...

5 But I think your efforts to try to  
6 slice and dice this, with all respect, your Honor, is  
7 really sort of losing the purpose of why this lawyer  
8 is looking at it. It's not just to edit it to make  
9 it pretty, it's just to make sure that it's  
10 appropriate and comports with regulatory  
11 requirements. And we would all be imposing our  
12 subjective views as to, okay, what is legal advice  
13 and otherwise.

14 MS. MILLER: And I think an excellent  
15 point, following up on Rich, is that we're not going  
16 to see somebody filing a complaint with a regulatory  
17 body or in federal court or state court saying  
18 Johnson & Johnson's marketing materials were  
19 inaccurate and we're filing a consumer protection  
20 claim under California law because a meeting took  
21 place a day earlier or a day later. But we could one  
22 hundred percent see such a claim, a consumer  
23 protection claim, because they used this word that I  
24 can't say in number one that was changed. One  
25 hundred percent plaintiffs would attack the use of

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1 that word and say that's not true, they lied, this  
2 isn't true. They lied, this thing that was changed  
3 in number one, if this hadn't been changed, that this  
4 is a lie and this isn't true.

5 And so this is exactly the kind of  
6 change a lawyer needs to make to ensure that you  
7 don't get sued and that you don't have a consumer  
8 protection claim against you in your marketing  
9 materials. Right? Because that's what a lawyer's  
10 job is in reviewing marketing materials, is to  
11 protect against liability, both regulatory liability  
12 and litigation liability.

13 MR. LAPINSKI: Your Honor, can I make a  
14 couple comments, please?

15 SPECIAL MASTER SCHNEIDER: Of course.

16 MR. LAPINSKI: The first comment that I  
17 want to make, your Honor, is that in the privilege  
18 log, the privilege log stated that this document was  
19 a, quote, draft presentation from inside counsel  
20 providing legal advice regarding talc communications  
21 and marketing material, unquote.

22 Now, from my perspective, when I read  
23 that description, I read that description as it may  
24 be a presentation that was prepared by an in-house  
25 attorney regarding communications and marketing

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1 material. I was obviously incorrect on that when I  
2 read the description. So I don't think the  
3 description was adequate.

4 When I read the supplemental  
5 information that was provided in regard to the  
6 document, it's a draft presentation that redline  
7 edits were made on by an attorney.

8 My question would be, a couple  
9 different points is, was a non-attorney who prepared  
10 the draft presentation, to the extent that the draft  
11 presentation was not provided to us, we have a right  
12 to be able to see that particular draft. And if  
13 production of that particular draft to us requires  
14 the redaction of the attorney's redlines in order for  
15 us to have the draft, we have a right to that draft.

16 We don't know what the purpose was that  
17 the document was created for. And again, unless it  
18 was Patricia Villani reaching out to this  
19 non-attorney and saying I need you to prepare a  
20 presentation for me so that I can analyze from a  
21 legal perspective some communications and marketing  
22 stuff, again, we have a right to be able to get a  
23 copy of that draft presentation before Ms. Villani  
24 made her legal edits to it. It might not be the  
25 final that's presented anywhere, but we have a right

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1 to be able to see documents that are the work  
2 processes of a marketing department and iterations  
3 that a department is making and what they ultimately  
4 put out.

5 SPECIAL MASTER SCHNEIDER: Any  
6 objection to that, Ms. Miller?

7 MS. MILLER: I would like to reiterate,  
8 as we have before and as we did in our briefing,  
9 because I'm known to reiterate, we did not withhold  
10 drafts simply because they were shared with  
11 attorneys. We did not withhold communications of  
12 third party PR people simply because they were at  
13 some point shared with attorneys.

14 As you saw in the briefing, and that's  
15 why we put it in there, most of the APCO documents  
16 were produced. And you know it from the production.  
17 Most of the Purple documents were produced. You guys  
18 know, you have tons and tons, and I said this before,  
19 you're drowning and drowning in press releases. We  
20 didn't do that. All we withheld was the  
21 communications with the lawyers and the lawyer's  
22 redlines.

23 So for every document that had a  
24 stand-alone version separate from the ones that were  
25 redlined by the attorneys or in the privilege

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1 communications, there are multiple, multiple copies  
2 in the production.

3 MR. LAPINSKI: Your Honor, the last  
4 point that I would bring up in regard to this from  
5 our end, this is an example of one of the documents  
6 where the attorney is sending this document back not  
7 only to the senior global management for Johnson's  
8 Baby Powder, but is also copying Chris Durlak and  
9 Alec Jacobs from Purple Strategies. And our position  
10 is that Purple Strategies is a third party company,  
11 they're not retained as a litigation consultant,  
12 they're a marketing consultant, and there is a waiver  
13 of any type of privilege related to the edits that  
14 were posted.

15 SPECIAL MASTER SCHNEIDER: Okay.

16 MS. MILLER: I could repeat --

17 SPECIAL MASTER SCHNEIDER: Next  
18 document. Next document. I think we beat that one  
19 to death.

20 MS. MILLER: Okay.

21 SPECIAL MASTER SCHNEIDER: 39.

22 I think this is a stand-alone page.  
23 Tell me why this is privileged. It's not terribly  
24 important, but I have to rule on it.

25 You're on mute, Ms. Miller. Ms.



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1 Miller, you're on mute.

2 MS. MILLER: I'm so sorry. This is  
3 privileged because Ms. Pound is seeking Mr.  
4 O'Shaughnessy's review and approval of the  
5 attachment.

6 SPECIAL MASTER SCHNEIDER: How do I  
7 know that?

8 What support is there for that?

9 MS. MILLER: Your Honor, again, I'm  
10 going to point you back to the Vioxx case and --

11 SPECIAL MASTER SCHNEIDER: Hold on.  
12 Tell me on this. Just on the face of the document,  
13 is it there? Just because O'Shaughnessy is copied?

14 MR. BERNARDO: No, your Honor.  
15 Your Honor, this is a good example  
16 of --

17 MS. MILLER: It says John. Wait, Rich.  
18 I don't know where you are, but, your Honor, it says  
19 John colon.

20 MR. BERNARDO: Right.

21 SPECIAL MASTER SCHNEIDER: So?

22 MS. MILLER: So it's a note to him.

23 SPECIAL MASTER SCHNEIDER: So?

24 MS. MILLER: So she is clearly asking  
25 him to review and provide his okay on it.

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1 MR. BERNARDO: I think this is another  
2 one that would be appropriate to talk about in camera  
3 because, your Honor, I do think the words are all  
4 right there on paper. And this is a perfect example  
5 of one where I think in plaintiffs' mind a lawyer is  
6 CC'd, but I think we've explained in the briefing,  
7 and I think everybody on this Zoom knows, that where  
8 a name lands these days in an email chain does not  
9 indicate the person to whom everybody else is  
10 speaking. Sometimes --

11 SPECIAL MASTER SCHNEIDER: You froze,  
12 Mr. Bernardo.

13 MR. BERNARDO: What's that?

14 SPECIAL MASTER SCHNEIDER: Everybody  
15 froze.

16 MR. LAPINSKI: You know, your Honor, we  
17 can hear you, but you're frozen on your screen.

18 MS. O'DELL: Oh, there we go.

19 MR. LAPINSKI: Now you're back.

20 MR. BERNARDO: Your Honor, this might  
21 be one we can -- I mean, there is so few words, it's  
22 hard to give an example without -- I think we could  
23 explain this to your satisfaction, but I was simply  
24 making the point that I believe this falls in the  
25 category that plaintiffs point out that Mr.

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1 O'Shaughnessy is only CC'd and it's simply a product  
2 of the way in which everybody just hits "reply all"  
3 or "forward" or things like that. But it's very  
4 clear this isn't being directed to him. But, in any  
5 event.

6 MS. MILLER: I do want to add that  
7 point. If you look at the subject line, it says  
8 "re." So it was a reply all to some other email, so  
9 for convenience somebody hit reply all. But the John  
10 colon makes clear that this email was directed to  
11 John.

12 And I do feel, your Honor, that when  
13 looking at privilege, as lawyers, I don't think we're  
14 supposed to throw our common sense away. And common  
15 sense, in plain English, made clear that this was  
16 directed to Mr. O'Shaughnessy.

17 MR. PLACITELLA: The only thing I would  
18 say, your Honor, is -- this is Chris -- if lawyers  
19 are participating in what the public is being told  
20 about talc safety, that deserves extra scrutiny. And  
21 not having seen the document, it's hard to  
22 hypothesize, but if representations are being made  
23 about the talc safety or information is being  
24 conveyed about talc safety, that deserves a hard  
25 look.

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1 MS. MILLER: Your Honor, if that's the  
2 case, then we are entitled to all the draft press  
3 releases that plaintiffs' lawyers have put together  
4 because they're making representations about talc  
5 unsafety on a daily basis to the New York Times, to  
6 Reuters. The Beasley Allen firm has an entire PR  
7 outfit, they're making representations all the time.  
8 Are those entitled to a stricter scrutiny? I  
9 literally don't understand what Mr. Placitella is  
10 talking about.

11 MR. PLACITELLA: So is that an  
12 admission that Mr. O'Shaughnessy and others are, in  
13 fact, making input about talc safety?

14 MR. BERNARDO: No, I think that's --  
15 Chris I think that's --

16 MR. PLACITELLA: Oh.

17 MR. BERNARDO: Be careful what you ask  
18 for because if you apply the very test that you're  
19 claiming, while we disagree with your factual  
20 assertion, it certainly applies on both sides.

21 SPECIAL MASTER SCHNEIDER: Mr.  
22 Bernardo, wouldn't there be a question of relevancy?

23 I understand that plaintiffs are  
24 inquiring directing discovery to these public  
25 announcements, relations, whatever, because it's

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1 relevant to their claim that J&J is misrepresenting  
2 or hiding, et cetera. What possible relevance to a  
3 claim or defense in the case is it that a law firm  
4 for the plaintiffs is sending out press releases?  
5 Under Rule 26, what is it relevant to?

6 MR. BERNARDO: Actually, it's highly  
7 relevant because it caused the product to have to be  
8 discontinued. And that's one of the claims in the  
9 case, that --

10 SPECIAL MASTER SCHNEIDER: No. But  
11 what's relevant to the claim or defense?

12 MR. BERNARDO: One of the claims or  
13 defenses in this case, your Honor, is that the  
14 product was discontinued for health and safety  
15 reasons. The product was discontinued because  
16 plaintiffs' advertising caused it to be discontinued.  
17 And that has now become front and center in this  
18 case.

19 SPECIAL MASTER SCHNEIDER: So then why  
20 does a draft -- even if you accept your argument,  
21 which is a little bit of a stretch, why in heck is a  
22 draft press release relevant if you're arguing the  
23 final press release that was released to the public  
24 is causing the regulators to withdraw this product  
25 from the market? Why are we arguing about this? I

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1 don't see it. But I can see the distinction between  
2 getting press releases from the plaintiffs and  
3 getting press releases from the defendants. But  
4 fortunately, we don't have to decide that here.

5 MR. BERNARDO: We may have to decide  
6 that soon.

7 (Laughter)

8 SPECIAL MASTER SCHNEIDER: Well, you  
9 have a sense of how I would rule.

10 MS. SHARKO: If I could for a minute,  
11 Judge Schneider, maybe you misspoke, but you just  
12 said the regulators caused the product to be  
13 withdrawn from the market?

14 SPECIAL MASTER SCHNEIDER: No. No.  
15 That's -- I certainly didn't -- that's not correct.

16 MS. SHARKO: Okay. Good.

17 SPECIAL MASTER SCHNEIDER: I think Mr.  
18 Bernardo was arguing that plaintiffs' actions --  
19 plaintiffs' press releases somehow led to some type  
20 of, I don't know, the record will speak for itself,  
21 some type of detrimental action against J&J. That's  
22 what I understood.

23 MR. BERNARDO: Well, as your Honor  
24 learns more about this case, you'll understand that  
25 that's just not Mr. Bernardo's assertion, it's

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1 actually a very dark reality. And I say that with  
2 seriousness. We don't need to go there because  
3 obviously parties disagree about that, but that's an  
4 issue that's coming up in this litigation.

5 SPECIAL MASTER SCHNEIDER: Okay.

6 Number 46. Ms. Miller, were these  
7 underlying books produced in discovery?

8 MS. MILLER: This is a Rich question.

9 MR. BERNARDO: Oh, I'm sorry. My  
10 understanding is that they weren't, your Honor. And  
11 there was a fair amount of back and forth about them.

12 SPECIAL MASTER SCHNEIDER: Okay.

13 47. It says this was requested by  
14 counsel to render legal advice. Where is the support  
15 for that? Granted, I see the first one, two, three,  
16 four words. So there was some sort of message that  
17 was left for the author. But the representation is  
18 that it was made to -- the information was provided  
19 so that counsel could render informed legal advice.

20 MR. BERNARDO: Your Honor, this would  
21 be a rehashing of the very issue with which we all  
22 may disagree that we discussed before, Mr.  
23 O'Shaughnessy's role and his role in 2004 and the  
24 very purpose of his keeping himself abreast of these  
25 issues.



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1 SPECIAL MASTER SCHNEIDER: Okay. So  
2 this is a good example. The argument is being made  
3 that all factual information regarding talc provided  
4 to O'Shaughnessy was necessary for him to render  
5 legal advice.

6 MR. BERNARDO: As a result of ongoing  
7 and anticipated litigation, including some that was  
8 occurring exactly at that time, but that's correct.

9 And again, I don't want to rehash all  
10 our arguments. Ms. Sharko, Ms. Miller and I already  
11 gave you a rendition of Mr. O'Shaughnessy's role.  
12 But just given his role, there would be no other  
13 reason for Mr. O'Shaughnessy to become educated about  
14 this or to try to learn this than for purposes of his  
15 defending actively and anticipated litigation.

16 MS. MILLER: We would add though, I  
17 would just add that to the extent he obtained that  
18 information in a non-privileged context, like if he's  
19 sitting in a room in the Talc Steering Committee,  
20 whatever is happening in that room I would not say is  
21 privileged, but to the extent he called someone  
22 privately and says hey, I need some information, he  
23 as a lawyer is calling someone privately and getting  
24 information, I would distinguish that from what's  
25 happening in a big room where he's sitting in a

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1 meeting.

2 Just, for example, like the example  
3 Rich gave earlier, if we go to a conference, whatever  
4 happens in that conference isn't privileged because  
5 we're there, but if we follow up and call our client  
6 and say hey, I was at the conference and I heard this  
7 and I'm trying to figure out what it all meant  
8 because that's going to be relevant to the advice I  
9 later provide my client, that followup call would  
10 then be privileged.

11 SPECIAL MASTER SCHNEIDER: This is  
12 representative of a big issue that we have to deal  
13 with because you want the inference to be drawn that,  
14 in essence, all factual information regarding talc  
15 provided by O'Shaughnessy was at his express or  
16 implicit request so he could render legal advice.

17 MR. BERNARDO: That's right, your  
18 Honor, because there was no other reason. I mean,  
19 folks have used the words "business purpose." Mr.  
20 O'Shaughnessy doesn't have a business purpose. He's  
21 not a marketer, he's not a scientist, he's not -- Mr.  
22 O'Shaughnessy is a litigator who -- I'm not saying he  
23 doesn't know anything else, and I go back to  
24 Jessica's Superman comment, but he's not Superman,  
25 he's a litigator. And just like everything I've

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1 learned and I know, and I know all sorts of esoteric  
2 facts, and plaintiffs do as well, and we learn them  
3 because of our need to understand them for purposes  
4 of defending our client.

5 I don't think it would be appropriate  
6 to depose me about the facts I've learned about  
7 talcum powder because some of them are not privileged  
8 facts. I've learned them and I understand them as a  
9 lawyer. And, again, I want to make sure that our  
10 agreement to allow Mr. O'Shaughnessy's, you know,  
11 understanding of things that he may or may not have  
12 done in or out of that capacity to get explored, but  
13 by agreeing to put them up it doesn't change the mix.  
14 I mean we're not going to depose Mr. Lapinski as to  
15 what he knows, we're not going to depose hopefully  
16 not me, but maybe we will. But it is no different  
17 for -- I mean, he's really, if you think about it,  
18 he's outside counsel who just happens for efficiency  
19 purposes to be hired on a hundred percent basis by  
20 the company. He's not their business lawyer, as  
21 there are others who are.

22 SPECIAL MASTER SCHNEIDER: Mr.  
23 Lapinski.

24 MR. LAPINSKI: Yes, your Honor. The --  
25 go ahead, Ms. Miller, if you want to build on Mr.

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1 Bernardo and then I'll respond to the two of you.

2 MS. MILLER: It's just one sentence.

3 Your Honor mentioned the word inference, and I don't  
4 think it's an inference because Mr. O'Shaughnessy  
5 signed an affidavit in which he swore that all the  
6 work he performed was in his professional capacity as  
7 legal counsel.

8 SPECIAL MASTER SCHNEIDER: And what did  
9 I say in Valsartan, or whatever case it was? I don't  
10 have to accept that at face value. And with all due  
11 respect to Mr. O'Shaughnessy, I don't know him from a  
12 hole in the wall, I don't know if he's credible or  
13 not credible. But, Ms. Miller, if I accepted a  
14 representation like that, then in every single case,  
15 in every single instance the document would be  
16 privileged because every witness says what Mr.  
17 O'Shaughnessy said in general boiler plate fashion in  
18 that affidavit. That's an example of the kind of  
19 statement that I just can't accept at face value. I  
20 have to delve a little bit deeper because it would  
21 just be too easy to --

22 MS. MILLER: I understand --

23 SPECIAL MASTER SCHNEIDER: -- to get  
24 around privilege issues by making a general boiler  
25 plate statement like that.

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1 MS. MILLER: I understand, your Honor.  
2 I also think, though, that it's really important as  
3 we're all sitting here today to sort of take a step  
4 back and appreciate that like the attorney-client  
5 privilege is something that's sacrosanct in like  
6 legal jurisprudence. It's not like -- I'm almost  
7 sort of starting to feel today as if there is this  
8 like, I don't know, some sort of presumption that  
9 there is some dishonesty going on in the invocation  
10 of the attorney-client privilege. There was almost a  
11 suggestion today that somebody would have like  
12 falsely put the name of the case on a memorandum as  
13 if to hide facts about something in order to  
14 circumvent releasing completely unimportant  
15 information through using the attorney-client  
16 privilege. And it's a little bit disturbing because,  
17 you know, we have poured through these documents,  
18 Rich and I, Sunday morning after Sunday morning to  
19 pare them down. And, you know, plaintiffs' brief  
20 sort of, I thought, sort of criticized us for  
21 downgrading so many documents, but the reason we did  
22 that was really to like just pare these down to  
23 documents that are clearly instances that relate  
24 directly to lawyers doing their job or to non-lawyers  
25 providing information related to litigation. That's

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1 all that we're talking about here. There is nothing  
2 else.

3 So when people say that like, you know,  
4 there are assumptions and there are inferences as  
5 though there is some sort of something nefarious  
6 going on here, I really want to be clear that there  
7 is not a single document here that we feel involves  
8 any attorney like -- there is not even any document  
9 here that is even a stretch in terms of an attorney  
10 going anywhere outside the four corners of providing  
11 legal advice. So I just -- I just feel a little bit  
12 like there has been some suggestions on this call  
13 that maybe there is an inappropriate effort here to  
14 shield these documents. And as your Honor knows,  
15 most of these documents are really extremely boring  
16 documents. So there wouldn't even be a reason to  
17 make such an effort, but we're really here because we  
18 believe in the attorney-client privilege and because  
19 it would be grossly unfair for a corporation to not  
20 have the benefit of the attorney-client privilege  
21 when that is a sacrosanct principle in the law that  
22 is available to every individual. And especially the  
23 fact that some of these lawyers are no longer even  
24 living, and so that should not be a reason why the  
25 privilege is not available.



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1 I really think that's important to sort  
2 of take a step back and appreciate that, you know,  
3 these are lawyers doing their jobs and that's all  
4 that's going on in these documents.

5 MR. LAPINSKI: Your Honor, one thing  
6 that I will say is I don't think that plaintiffs'  
7 counsel is coming forward here with a presumption of  
8 dishonesty, but the defendants do have the burden in  
9 order to establish the attorney-client privilege.  
10 And if the burden is not met on a particular  
11 document, then the document should be produced.

12 And the arguments that are being made  
13 right now are arguments that, as sacrosanct as Ms.  
14 Miller has said the attorney-client privilege is, one  
15 of the cores of that deals with documents like the  
16 one we're dealing with here where if there is no  
17 indication that the exchange of information is for  
18 the purpose of rendering legal advice, it opens up  
19 the opportunity where all anyone will have to do is  
20 CC an attorney on a document and that document in and  
21 of itself will be rendered attorney-client privileged  
22 because that particular attorney, anything that he's  
23 involved in is assumed to be for litigation purposes  
24 only.

25 And that rolls over to this, that this



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1 email is being sent and the email is being sent, and  
2 simply because it's being sent to an attorney, it has  
3 to be because the attorney is going to render legal  
4 advice or needs it in anticipation of litigation.  
5 That's our position on this.

6 MS. MILLER: We did not withhold a  
7 single document merely because a lawyer was CC'd.  
8 Not one document. I want to make that clear. Not  
9 one document in here was withheld because a lawyer  
10 was CC'd. This document was withheld because the  
11 very first word in it is John colon, it is written to  
12 John.

13 SPECIAL MASTER SCHNEIDER: Okay.

14 MR. PLACITELLA: Your Honor, just one  
15 comment because there is a lot of rhetoric.

16 The essence of what we've been  
17 directing our attention to are facts, not assertions  
18 of wrongdoing. Facts. And that's really been the  
19 focus of the discussion. The fact that the privilege  
20 log is vague, you know, that works against us,  
21 obviously. So it's either we're looking for facts or  
22 we're looking for places where assertions were made  
23 about product safety that were intended to reach the  
24 public. That's it. So I just want to stop and take  
25 a pause because there are a lot of things said I

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1 think that are not fair characterizations. That's  
2 all.

3 SPECIAL MASTER SCHNEIDER: 55.

4 This is another example of pure  
5 objective facts. And the argument is that the court  
6 should infer that these facts were provided to render  
7 legal advice. And I'm repeating myself, but what's  
8 the basis for making that inference, implication? I  
9 know the information was provided to Mr.  
10 O'Shaughnessy. Does it just boil down to all facts  
11 provided to Mr. O'Shaughnessy was so that he could  
12 render legal advice?

13 MS. MILLER: So, first of all, I would  
14 say that when Mr. O'Shaughnessy as a lawyer for J&J  
15 goes to someone at the subsidiary requesting  
16 information, yes, he's requesting that information  
17 because he's a lawyer and he needs it for a legal  
18 purpose. He was not a businessman. He was not in  
19 marketing. He was not a scientist. He had no other  
20 job. I know I sound like a broken record, and I  
21 sincerely apologize for that, especially on a Friday  
22 afternoon. I'm told by my children that I repeat  
23 myself too much, but I just -- I can't help it  
24 because that is the point.

25 I will also happen to mention that

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1 there was a case going on at this exact point, is  
2 that correct, Rich, for which this information was  
3 being collected. So it is not just an inference, it  
4 is actually a fact that at this point in time he was  
5 collecting information for a case that had just been  
6 filed. And Rich can provide more information on that  
7 context.

8 MR. BERNARDO: Your Honor, and I want  
9 to make it abundantly clear for the record what I'm  
10 about to say has nothing to do with this document.  
11 I'm hoping that I can make up some facts that would  
12 kind of explain why sometimes facts are mental  
13 impressions and work product that a lawyer is using.

14 So if I'm investigating a case of a  
15 pharmaceutical and I understand that it may have  
16 potential liability, I may say: Client, I would like  
17 to see a rundown of this information. I would like  
18 you to organization it this way because when you do,  
19 I can get a sense for myself of what the potential  
20 liability might be. I can get it -- you know, I can  
21 get it by whether it's age or whatever stratification  
22 I want to make there. I'm just asking for facts.  
23 But what I'm asking for reflects how I want them and  
24 why I want them. Those facts in there are  
25 disclosable and they should be disclosable, and I

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1 guarantee you they are disclosed in the litigation.  
2 But because I asked for them in the way I asked for  
3 them, it changes them from mere facts to my work  
4 product that plaintiffs can't show a need for, let  
5 alone a substantial need for, because they can get  
6 those facts if they want them. And they have, and  
7 they got them through the ordinary discovery process.

8           Again, I don't know if that helps. And  
9 I'm totally, as you know, your Honor, because you're  
10 looking at the document, what I'm talking about has  
11 nothing to do with this, but it kind of might help  
12 explain why it's important to distinguish between  
13 ordinary facts and facts and analysis facts for a  
14 lawyer in connection with his due diligence or his  
15 investigation or his thinking about the case. And,  
16 again, I wish this weren't all such vanilla,  
17 unimportant content, that we would be fighting about  
18 something a lot sexier than this, but this is what  
19 I've got and I'm trying to again -- Ms. Miller and I  
20 talk frequently and every third word out of her mouth  
21 is waiver. And that's very important to us. And I  
22 don't want to do anything that is going to risk  
23 waiver because, as you know, your Honor, this is part  
24 of many cases and people are going to use this  
25 transcript and what I say and what's said not just in

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1 this MDL, but in multiple places and claim that we  
2 waived something. So --

3 SPECIAL MASTER SCHNEIDER: Let me ask  
4 this question.

5 Since J&J is making this argument that  
6 O'Shaughnessy's sole role was litigation, that  
7 everything -- not everything, all the facts,  
8 information provided to him was necessary for his  
9 legal advice or in connection with a particular case,  
10 should the court wait to hear what O'Shaughnessy says  
11 next Tuesday about his role and what he does? He'll  
12 be questioned by Mr. Block, so that is effectively a  
13 cross-examination and we'll have a better idea  
14 Tuesday, Wednesday of precisely what Mr.  
15 O'Shaughnessy's role was.

16 MR. BERNARDO: That's an excellent  
17 point, your Honor. And I really mean this, I was  
18 going to earlier make the comment you're going to get  
19 to talk to Mr. O'Shaughnessy on Tuesday, but I agree  
20 with you, you are going to get a chance to meet  
21 virtually him and hopefully meet in person the  
22 following week. And you'll get a chance to speak  
23 with him in camera and explore this. And I'm  
24 convinced that when you do, you'll better appreciate  
25 what Jessica and Ms. Sharko and I are saying.

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1                   And it's largely because we worked with  
2 Mr. O'Shaughnessy, for me more than a decade. Susan,  
3 I won't out you, I'm guessing it's substantially more  
4 than a decade. And we know what he's done. We tried  
5 to communicate that through his affidavit, and we  
6 didn't do that clearly. We apologize. But I think  
7 you will see that. So the short answer is yes, your  
8 Honor.

9                   SPECIAL MASTER SCHNEIDER: Okay. So I  
10 mean that was one of the things I thought of that I  
11 was going to ask counsel. It makes so much sense to  
12 hear from the horse's mouth what his role was rather  
13 than, you know, in my view, the general affidavit  
14 that we received. So much of the argument today  
15 depends on O'Shaughnessy's role. Was it exclusively  
16 litigation related? We'll find out Tuesday and  
17 Wednesday what it was.

18                   So I agree that that testimony will be  
19 helpful. And it really would help answer the  
20 question say, for example, 55, were these objective  
21 facts solely for litigation purposes or so he could  
22 render legal advice.

23                   I know Mr. Lapinski has to leave soon,  
24 so I just want to focus on hopefully important  
25 documents.

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1 56.

2 Do you know, Ms. Miller, if the  
3 documents referred to in this letter were produced?

4 MS. MILLER: They were. I believe it's  
5 the same -- this relates to those same binders we  
6 talked about earlier.

7 SPECIAL MASTER SCHNEIDER: Okay. They  
8 sound important.

9 MR. BERNARDO: You'll be very  
10 disappointed, your Honor.

11 (Laughter)

12 MR. PLACITELLA: Can I just amend the  
13 question, your Honor, if you don't mind? Were they  
14 produced at the time, the document, contemporaneous  
15 or ever produced? I think it matters.

16 MR. BERNARDO: I don't think it matters  
17 to the assessment of privilege, Chris, and I'm not in  
18 a position, as I sit here, to be able to answer that.

19 MR. PLACITELLA: Okay.

20 MS. MILLER: Were they produced  
21 contemporaneous with when they occurred?

22 MR. PLACITELLA: Right.

23 So if there was litigation pending in  
24 say 1898 (sic) and there were facts in 1898 (sic),  
25 was it produced in 1998 or was it produced in 2017?



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1 When you say produced, I just don't know what that  
2 means, that's all.

3 MS. MILLER: What we're saying is you  
4 have it. I think that's what the judge is asking and  
5 our answer is you have it.

6 SPECIAL MASTER SCHNEIDER: I'm only  
7 concerned about this case.

8 MS. MILLER: Yes, you have it. And our  
9 answer is yes.

10 Is that correct.

11 SPECIAL MASTER SCHNEIDER: Ms. Miller,  
12 number 58. I'm not sure I have the right documents.  
13 I'll tell you what I have. I have a document that  
14 says this document is addressed in Appendix A above.  
15 I don't know what that means. And then document  
16 Bates stamped 474.

17 So do I not have the right documents?

18 MS. MILLER: I believe that it's a  
19 dupe, so I believe that tab 6 and tab 58 are just the  
20 same document.

21 SPECIAL MASTER SCHNEIDER: Six and 58?

22 MS. MILLER: Are the same document.

23 SPECIAL MASTER SCHNEIDER: Okay.

24 MS. MILLER: So if you have questions  
25 about it, we can answer your questions and then your

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1 questions will address both six and 58.

2 SPECIAL MASTER SCHNEIDER: Okay. I

3 don't have any questions about number six.

4 MS. MILLER: Then we're good.

5 MR. TISI: Judge, I'm sorry, I thought  
6 we were talking about Exhibit 56, am I wrong, or was  
7 it 58?

8 SPECIAL MASTER SCHNEIDER: The one I  
9 just did was 58.

10 MR. TISI: We were not talking about  
11 56?

12 SPECIAL MASTER SCHNEIDER: 56?

13 MS. MILLER: We moved past it, Chris.

14 MR. TISI: The one question I had, do  
15 we know the date of that document?

16 SPECIAL MASTER SCHNEIDER: Which one?

17 MR. TISI: 56.

18 MS. MILLER: It's not dated, Chris.

19 MR. TISI: Okay.

20 MS. MILLER: Any document -- Chris, any  
21 document that was dated, we put the date on those  
22 descriptions. If there is no date on the  
23 description, the document wasn't dated.

24 SPECIAL MASTER SCHNEIDER: Ms. Miller,  
25 number 60. Is this one of those where the court

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1 should infer that these documents are produced to  
2 O'Shaughnessy to render legal advice? And no  
3 other purpose? Well, the primary purpose?

4 MS. MILLER: I'm sorry. I had to  
5 switch binders. 60 is binder two.

6 Are we going to be discussing these in  
7 camera, because I would like --

8 SPECIAL MASTER SCHNEIDER: Is this one  
9 of the documents you want to discuss? Okay.

10 MS. MILLER: Yes. Very much so.

11 SPECIAL MASTER SCHNEIDER: Okay.

12 MR. BERNARDO: I apologize, I had to  
13 stop a spam call from disrupting us.

14 Can somebody tell me what tab we're on?

15 MS. MILLER: We're on tab 60. And I  
16 was explaining that tab 60 is one I can only explain  
17 in camera.

18 MR. BERNARDO: Thank you.

19 SPECIAL MASTER SCHNEIDER: How about  
20 67, Ms. Miller, am I missing an attachment?

21 Oh, it might be in the binder. It  
22 might be in the binder.

23 MS. MILLER: Yeah. 67 has a pink  
24 sheet, that's the attachment.

25 SPECIAL MASTER SCHNEIDER: Yeah, you're

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1 right.

2 MS. MILLER: And 67 also has a dupe  
3 somewhere.

4 SPECIAL MASTER SCHNEIDER: Let me see.  
5 There was one document that was important that I  
6 wanted to get to.

7 83.

8 Is the answer to this going to be in  
9 that missing document in the supplemental production?

10 MS. MILLER: Tab 83 is a document that  
11 says on it "fact sheet" and it has a cover email that  
12 should be pink.

13 SPECIAL MASTER SCHNEIDER: Okay. I'll  
14 get to that.

15 MS. MILLER: And the cover email is to  
16 Joe Braunreuther, who is the head of litigation. If  
17 you're missing that cover email --

18 SPECIAL MASTER SCHNEIDER: No, I have  
19 it.

20 MS. MILLER: Okay. Great.

21 SPECIAL MASTER SCHNEIDER: Okay. What  
22 do you want to do now?

23 Do you want to break and go to the in  
24 camera discussion and maybe in an hour or so we'll  
25 just rejoin and hopefully adjourn after that?

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1 MR. LAPINSKI: Your Honor, that's up to  
2 you.

3 Unfortunately, I have to leave in 15  
4 minutes.

5 SPECIAL MASTER SCHNEIDER: Right.

6 Why don't we do that. Let's take a  
7 five-minute break, we'll use the services hopefully  
8 of this company and put the defense team in a  
9 separate room.

10 Plaintiffs, why don't you join us in  
11 one hour, 4:45, and hopefully we'll see if we can  
12 wrap it up. Thank you.

13 So let's adjourn for five minutes and  
14 we'll come back with just the defense team.

15 (Off-the-record discussion)

16 (Recess is taken)

17 (The following takes place in a Zoom  
18 breakout room out of the presence of plaintiffs'  
19 attorneys)

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1 (The following takes place with all  
2 attorneys present on the Zoom screen)

3 SPECIAL MASTER SCHNEIDER: We're back  
4 on the record now with all counsel.

5 I can represent to plaintiffs' counsel  
6 that the discussion that we went into the separate  
7 breakout room was solely and exclusively regarding  
8 privileged information and nothing other than  
9 privileged information was discussed. We were very  
10 careful about that.

11 And the court addressed some particular  
12 documents it had concerns about. Mr. Bernardo and  
13 Ms. Miller relayed clear work product information and  
14 attorney-client privilege information, and I have no  
15 hesitation making that representation.

16 I think it would be helpful if I heard  
17 what Mr. O'Shaughnessy has to say next week to render  
18 a ruling as to these privilege documents.

19 Mr. Lapinski, I know he had to run to  
20 something more important than this argument, but at  
21 least if the issue comes before me, you've heard what  
22 I said a hundred times: I will not let plaintiffs be  
23 prejudiced if it turns out certain materially  
24 relevant documents are produced after the deposition.

25 What else can I say?

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1 I think the record should be closed at  
2 this point. Ms. Miller, I don't need any more  
3 citations, no more briefs. We're done. We're  
4 finished. Let's close the record.

5 We'll wait to hear what Mr.  
6 O'Shaughnessy says and then you'll get my rulings. I  
7 think it's prudent, like J&J had said, that we not  
8 try to rush these additional documents and get  
9 decisions before your deposition on the 29th, I  
10 think. And I think that's the prudent way to  
11 proceed.

12 You're fortunate in that hopefully the  
13 logistics of the deposition next week have been all  
14 worked out. We worked really hard on that. So that  
15 when the plaintiffs in this case get to depose  
16 O'Shaughnessy, hopefully all the rough spots will be  
17 worked out and we'll have to see how it goes.

18 In terms of time, you've heard what I  
19 had to say if the issue come before me. I firmly  
20 believe that plaintiffs should be able to wrap this  
21 up in two days or less, with the caveat that I don't  
22 know how much arguing is going to go on. So if I was  
23 in the plaintiffs' shoes, I would use my best efforts  
24 to try to wrap up things in two days. But again, I  
25 don't know how much time is going to be argument.

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1 And oh, by the way, I wouldn't be  
2 shocked if J&J does some direct examination, so that  
3 may affect the timing. So I'm prepared.

4 I can't thank you enough for all the  
5 hard work that went into today. I thought it was an  
6 extremely valuable argument. Obviously, there are  
7 disagreements between the parties, but that's what  
8 litigation is all about. But, of course, everyone  
9 acts thoroughly professional, which is not  
10 surprising.

11 I think I have everything I need to  
12 decide the issue. Like I said, no further briefs or  
13 affidavits are necessary. The record is closed.

14 For the good of the order, any other  
15 issues anyone wants to raise?

16 Theresa, thank you for staying on the  
17 line so long, it's been a long day, but it was  
18 worthwhile and your efforts are appreciated.

19 THE REPORTER: You're welcome, your  
20 Honor.

21 SPECIAL MASTER SCHNEIDER: And that  
22 goes for everybody..

23 So for the good of the order, does  
24 anyone else have anything else they want to add  
25 before we close this session?



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1 MS. PARFITT: I think we want to thank  
2 you, Judge, and wish you a happy Father's Day as  
3 well.

4 SPECIAL MASTER SCHNEIDER: Oh, thanks.  
5 The same to everybody on the phone.

6 MR. BERNARDO: Thank you, your Honor.  
7 We really appreciate the amount of time you've taken  
8 to listen to our arguments.

9 SPECIAL MASTER SCHNEIDER: Okay.  
10 Everybody enjoy the weekend. Hopefully  
11 happy hour is still going or getting started soon. I  
12 don't partake much, but who knows, it's been a long  
13 day, maybe I'll have a cold one. But it's always  
14 great dealing with great people and great counsel.  
15 And we're adjourned and have a great weekend  
16 everybody.

17 (Hearing concluded)

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C E R T I F I C A T E

I, Theresa Mastroianni Kugler, a Notary Public  
and Certified Shorthand Reporter of the State of New  
Jersey, do hereby certify that the foregoing is a  
true and accurate transcript of the testimony as  
taken stenographically by and before me at the time,  
place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a  
relative nor employee nor attorney nor counsel of any  
of the parties to this action, and that I am neither  
a relative nor employee of such attorney or counsel,  
and that I am not financially interested in the  
action.

DocuSigned by:  
*Theresa Kugler*  
439DA67C1C71495...

Theresa Mastroianni Kugler, C.S.R.  
Notary Public, State of New Jersey  
My Commission Expires May 5, 2021  
Certificate No. XI0857  
Date: June 20, 2021

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